United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

No. 24,630

365

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DOROTHY HEALEY,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION

and

UNITED STATES OF AMERICA,
Respondents

METROMEDIA, INC.
Intervenor

PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC

April 3, 1972

FACTS

On February 17, 1969, Los Angeles television station KTTV twice broadcast to its one million viewers[1/] a lengthy attack on petitioner by commentator George Putnam (Slip op. 2-3, full text of Putnam remarks at App., 3-5). The attack was triggered by a front page article in the preceding day's Los Angeles Times suggesting that, despite her Communist party affiliation,[2/] petitioner was a law-abiding and decent person who might be deemed a patriotic American.

Four examples of Mr. Putnam's attack will suffice:

> (1) In response to her claim that her home and office had been subjected to bugging, Putnam stated: "Actually, Mrs. Healey should be right at home with such tactics -- because they're all too commonplace among the Communists." (App. 5, Slip Op. 3.)
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> (2) In response to her claim that she wept upon learning of Stalinist atrocities, Putnam stated: "One can't help but wonder if she might have lost another night's sleep had Khrushchev told us of his own extermination of millions of Ukranians by systematic starvation. Wonder if she ever heard about that?" (App. 5, Slip Op. 3.)
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> (3) "Mrs. Healey makes the following unsubstantiated charge -- a charge it is doubtful even she believes -- . . . [quoting the Times article] 'In case after case, the parents of young people who have visited her are visited and threatened with loss of their jobs, if their children come back any more to see her.' Come, come, now Dorothy -- perhaps under Communism -- perhaps under the Nazis -- but it just doesn't happen in the United States of America." (App. 5, Slip Op. 3.)
>
> (4) Dorothy Healey may be the Los Angeles Times' kind of exemplary American, who professes sincere patriotism . . . but she sure as hell is not mine. And, my fellow Americans, I trust she is not yours. And if you are as shocked by this insult to American patriotism, I urge you to let the Times hear your voice -- loud and clear." (App. 5, Slip Op. 3.)

1/ See Television Factbook, Stations Volume, p. 80-b (1971-72).

2/ Petitioner, at the time, was Chairman of the Communist Party in Southern California.

Petitioner's efforts to respond to the Putnam attack were rejected by KTTV, the Commission,[1] and a panel of this Court on March 3, 1972.[2] Reconsideration en banc is warranted, inter alia, by the panel's unprecedented[3] ruling that, in order to invok the fairness doctrine, members of the public must have the extraordinary prescience and financial resources to have monitored the licensee's programming for a considerable enough period of time to establish that coverage of a particular issue was imbalanced.

> "On a complaint under the fairness doctrine, the burden is not only on the complainant to define the issue but also to allege and point specifically to an unfairness and imbalance in the programming of the licensee devoted to this particular issue." (Slip Op. 9.)

The practical effect of this burden of proof is to make the fairness doctrine inaccessible to most middle-class Americans like Mrs. Healey and especially to those members of the public who are most often the victims of imbalanced coverage of controversial issues: the poor, the black, the culturally and educationally disadvantaged.

Reconsideration is also warranted because the panel failed to address the real issue before it, because the Commission gave no reasons to support its ruling, and because the panel took an impermissably restrictive approach to determining what constitutes a controversial issue of public importance.

1/ Over the dissents of Commissioners Cox and Johnson. The full text of the Commission's letter to petitioner and the dissenting opinions are attached hereto as Appendix A. They also appear at pages 21-49 of the Appendix in this case (hereinafter cited as "App.").

2/ By order of March 28, 1972, the Court extended the time for filing a petition for rehearing to and including April 3, 1972.

3/ The issue was not relied upon by the Commission majority, was not briefed to the Court, and the panel's position is inconsistent with Commission policy and statutory and judicial interpretations of the fairness doctrine.

PROCEEDINGS BEFORE THE F.C.C.

In seeking relief from the Commission, petitioner maintained that the Putnam attack dealt with several interrelated "controversial issue(s) of public importance," including (1) Mrs. Healey's "role as a Communist in her community or in our society as a whole" (Slip Op. 8); (2) "The role played by individual Communists in our society" (App. 18, Slip Op. 8); (3) "guilt by association" (App. 18-19, Slip Op. 8);[1/] and (4) "bugging" or surveillance of homes and offices by public officials (App. 1-2; 25 (Commissioner Cox, dissenting); 38-39 (Commissioner Johnson, dissenting).)

The Commission majority, without offering any reasons,[2/] framed the issue before it in the following terms:

> "The matter . . . turns on the applicability of the fairness doctrine to Mr. Putnam's commentary . . . [W]e note the licensee's judgment that the matter which you claim to be a controversial issue of public importance -- the role played by you as a Communist -- is not an issue of public importance in its area." (App. 22.)

The Commission, relying on Putnam's lengthy quotations from portions of the Times' article favorable to Mrs. Healey -- a factor which it specifically disclaimed as relevant to achieving

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1/ This term was used by Commissioner Johnson, dissenting, to summarize the first two alternative statements of the issue: "Rather, the [Putnam] remarks attack Mrs. Healey because of qualities that presumably adhere to all members of her organization. There is a word for this technique, and that is 'guilt by association.'" (App. 36.)

2/ Even though Putnam's remarks constituted a personal attack on Mrs. Healey, the Commission held, and all parties before the Court agree, that the personal attack provisions of the fairness doctrine -- which trigger an automatic right of response if one is attacked in the context of a controversial issue -- are not, per se, applicable because the Putnam attack came in a newscast.

fairness (App. 22-23) -- refused to "find unreasonable the licensee's judgment as to the public significance of your role as a Communist" and "conclude[d] that no further action is warranted." (App. 23.)

ERRORS IN THE PANEL'S DECISION

A. Burden of Proof. The question of who must bear the burden of proving whether or not a licensee has dealt with a controversial issue in a balanced fashion lies at the very core of whether the fairness doctrine provides the public with a meaningful remedy to broadcaster attacks and distortions. Whereas the licensee has all the relevant information at his fingertips, and thus can readily provide the Commission with documentation of whether his programming has indeed dealt fairly with a particular issue, a private individual or group can only gather such information by extensive and prohibitively expensive monitoring of a station. Such monitoring is especially impracticable in cases involving personal attacks. Mrs. Healey had no reason to suspect that KTTV would broadcast an assault upon her and therefore had no reason to monitor its programming, even if she could afford to.

The panel refused to address any of the issues listed at p. 3, supra, except the first, because "there is neither allegation nor proof that this licensee failed to devote sufficient program time to these issues to present a fair and balanced view for the listening public" (Slip Op. 9).

(1) This ground for refusing to consider the broader issues surrounding Putnam's attack on Mrs. Healey was never

advanced by the Commission and never briefed to this Court. Thus, the panel specifically did what another panel, in another fairness doctrine case, warned that a Court must not do -- it substituted "its own judgment" for that of the agency.[1/] The panel incorrectly upheld F.C.C. action on grounds not clearly disclosed or articulated by the agency.[2/]

(2) The burden of proof created by the panel, in addition to being procedurally impermissible, is unfortunately at odds with the spirit and letter of the fairness doctrine as established by Congress, the Supreme Court and the Commission itself.

Section 315 of the Communications Act, as amended in 1959, imposes on broadcast licensees like KTTV an "obligation . . . to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." The Supreme Court (Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 383 (1969)) cited the legislative history of §315 as establishing that "[e]very licensee who is fortunate in obtaining a license is mandated to operate in the public interest and has assumed the obligation of presenting important public questions fairly and without bias."[3/]

1/ Columbia Broadcasting System v. F.C.C., ____ U.S. App. D.C. ____, ____ Fed. ____, Slip Op. at 19, Nos. 24,655 and 24,659, November 15, 1971.

2/ S.E.C. v. Chenery Corp., 318 U.S. 90,94 (1943); Saginaw Broadcasting Co. v. F.C.C., 68 U.S. App. D.C. 282, 96 Fed. 2d 554,563, cert. denied 305 U.S. 613 (1938); Secretary of Agriculture v. U.S., 347 U.S. 645,654 (1954).

3/ S. Rep. No. 562, 86th Cong., 1st Sess., 8-9 (1959) (emphasis added).

By making the burden of proof so great that few people will be able to invoke the protections of the fairness doctrine, the panel has, perhaps inadvertently but quite clearly, placed licensees on notice that their "obligation" to deal evenhandedly with important public issues is one which they can almost freely disregard since the public's "right" to redress violations lacks a workable remedy. Certainly, such a major emasculation of a congressionally and administratively created doctrine should only be tolerated by the courts after clear agency consideration of the issues and demonstration of the need for such a change. In the instant case, the agency never advanced the position taken by the panel.

(3) Even in general fairness doctrine complaints, the Commission's general practice is to require the licensee -- who has the relevant information at his fingertips -- to document whether the issue has received balanced treatment. 1/ In Friends of the Earth v. F.C.C., U.S. App. D.C. , F.2d (No. 24,556, August 16, 1972), this Court, after finding the existence of a controversial issue, remanded for "further inquiry by the Commission to determine whether the licensee has been adequately discharging its public service obligations by carrying a reasonable amount of information on the other side of the question . . ." (Slip Op. 2). As in National Broadcasting

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1/ See Letter to National Broadcasting Co., 30 F.C.C. 2d 643 (1971); Letter to Business Executives Move for Vietnam Peace, 25 F.C.C. 2d 216 (1970).

Co., supra, on remand in Friends of the Earth, the Commission has required the licensee, not the complainant, to supply documentation of programming balance.

When a fairness doctrine claim arises from a personal attack -- as in the instant case -- the Commission has explicitly declared that there is an "affirmative duty" on the licensee to assure that the underlying issues receive balanced coverage.[1/] The Commission reaffirmed this policy in an opinion issued less than one year ago:

> "Indeed, in our reports on the areas exempted from the personal attack rules, we stressed the necessity in any event to achieve fairness or to notify the person attacked and afford him the opportunity to give his side. See par. 5, Fed. Reg. §363. [2/]

Therefore, the panel erred in sustaining the agency's action by reaching an issue not properly before it and taking a position at odds with clear legislative, judicial and administrative policy.[3/]

B. Unduly Narrow Construction of the Issue. In Columbia Broadcasting Co., supra, another panel of this Court reversed an F.C.C. fairness doctrine ruling in part because "the Commission adopted a wholly unreasonable view of the factual setting of the controversy." (Slip Op., p. 19.) In

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1/ Memorandum Opinion and Order, 12 F.C.C. 2d 250, 252-53, par. 5 (1968), quoted at length in Commissioner Johnson's dissent, App. 42-43.

2/ In Re M. Goldseker Real Estate Co., 32 F.C.C. 2d 28, 29 (1971)

3/ It follows a fortiorari from Columbia Broadcasting Co., supra, that if the F.C.C. cannot abandon its own policy without giving clear reasons for such action, this Court cannot do so for the agency, especially when the issue was not even properly before the Court.

Healey the Commission similarly constricted the issues and gave no reasons despite the thorough analysis by the dissenters.[1] (See App. 25-28, 31, 35-40.):

> "To argue, therefore, as does the majority, that Mr. Putnam's commentary did not raise issues of controversy and public importance is simply to define such issues out of existence. The issues involved here are not merely 'the role played by [Mrs. Healey]. . . as a Communist,' as the majority contends. It is almost precisely the converse: the role played by Communists in general, as exemplified by the alleged activities of one person, and the treatment such persons receive as a group at the hands of our government."[2]

The panel, while almost conceding the controversial public importance of the broader issues (Slip Op. at 8), read them out of this case solely on the impermissible burden of proof ruling discussed supra. Therefore, the panel never addressed the actual issues raised by the Putnam attack, pleaded by petitioner to the Commission, articulated in both Commission dissents, and briefed and argued by petitioner to this Court.

C. The Commission Gave No Reasons for Its Ruling. The majority's letter, after devoting considerable space to summarizing the pleadings, disposed of the substance of petitioner's complaint in one paragraph.[3] This paragraph sets forth no reasons for the conclusion it reached and offers no

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1/ The relevance of dissenting opinions in sharpening the issues before an agency was recently stressed by this Court in Office of Communication of the United Church of Christ v. Federal Communications Commission, No. 24,762 (March 28, 1972) (Slip Op. 8).

2/ App. 39-40, Johnson dissent.

3/ App. 22-23 and pages 488-489 of Appendix A hereto.

justification for narrowing the issue. This shabby treatment of the issues led the usually restrained Commissioner Cox to characterize the majority letter as "prestidigitation -- now you see it, now you don't -- rather than a proper statement of the grounds for agency action."[1/]

The panel never addressed the Commission's lack of reasoning -- despite the focus of petitioner's oral argument and brief upon this question. Rather, the panel's opinion justifies the agency's result on grounds not articulated by the Commission, a clearly impermissible method of adjudication. See cases cited in footnote 2 on page 5, supra:

> "The orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." Chenery, supra, 318 U.S. at 94.

D. Narrow View of Controversial Issues. Even on the issue it did address, the panel took a view of controversial public issues which is inconsistent with Red Lion. The panel stated:

> Merely because a story is newsworthy does not mean that it contains a controversial issue of public importance. (Slip Op., 10.)

Yet the Court in Red Lion (395 U.S. at 384) cited Senator Pastore's explanation of the 1959 amendment to §315 as having the objective of "giving the people the right to have a full and complete disclosure of conflicting views on news of interest

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1/ App. 25

to the people of the country." (emphasis added.)

The very fact that the Times ran a lengthy story on page one and KTTV saw fit to twice broadcast Putnam's vitriolic response attests to the controversiality and public importance of the issue(s) at hand. The panel's answer that "the prime objective of Putnam's broadcast was to criticize the editorial judgment of the Los Angeles Times . . ." (Slip Op. 11) misses the clear objective of the fairness doctrine to permit the public to hear from persons who are the victims of media attacks their side of the issues. See Red Lion, supra, 395 U.S. at 378-379.

The effect of the panel's disposition of the instant case is to permit the media to make a mere shuttlecock of the individual -- to permit the broadcaster to attack that individual's role in society while denying the individual herself any opportunity to respond. This, as is pointed out above, is inconsistent with the spirit and letter of the fairness doctrine and §315, as clearly expressed by the Congress, the Courts and the Commission.

CONCLUSION

For the reasons above stated, this case should be reheard by the Court en banc.

Respectfully submitted,

TLR CC

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April 3, 1972

CERTIFICATE OF SERVICE

I, Thomas R. Asher, hereby certify that the foregoing "Petition for Rehearing and Suggestion for Rehearing En Banc" was served this 3rd day of April, 1972, by mailing true copies thereof, postage prepaid, to the following persons at the addresses shown below:

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F.C.C. 70-658

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
DOROTHY HEALEY, LOS ANGELES, CALIF.
Concerning Fairness Ruling Re Station
KTTV-TV, Los Angeles, Calif.

JUNE 24, 1970.

MRS. DOROTHY HEALEY,
Los Angeles, Calif.

DEAR MRS. HEALEY: This is in reply to your letter of complaint dated March 26, 1969, against Metromedia, Inc., the licensee of Station KTTV-TV, Los Angeles, California. You allege that on February 17, 1969, Station KTTV-TV broadcast some comments by a newsman, George Putnam, during a news program which attacked your "honesty, character, integrity, or like personal qualities" within the meaning of Section 73.679(a) of the Commission's Rules, and that the station has violated this rule by rejecting your request for an opportunity to respond. The comments were directed to a front-page article on you in the Los Angeles Times, of February 16, 1969, entitled "Patriot-Marxist—No. 1 Red Finds That U.S. Isn't All Bad."

The *Times* article, after noting that you are "a Marxist, a Communist, and an atheist," states that "in some ways Dorothy Healey might be considered an exemplary American and a good member of the bourgeoisie;" that "at 54, she runs her home, pays her taxes, cares for her aged mother, dotes on her scholarly son and generally likes folks, young and old; and that she professes a sincere patriotism and for years, while her son was in school, rarely missed a meeting of the PTA." The article further states that "she has been investigated, prosecuted and persecuted"; that "her house, she says, is bugged, her phone tapped and her mail examined"; and that, according to her, in case after case, the parents of young people who come to her ". . . are visited and threatened with the loss of their jobs if their children come back any more to see me."

Roughly, half of Mr. Putnam's commentary consisted of reciting the *Times* article, including all of the foregoing. The other portion of the commentary reflected Mr. Putnam's vigorous and complete disagreement with the *Times'* story and its use of the term "Patriot" in relation to you. Mr. Putnam states, after reciting Communist horrors and your expressed desire to see the American economic system overthrown, that the article is "an insult to American patriotism," and that Mrs. Healey while "she may be the Los Angeles Times' kind of patriot . . . sure as hell is not [his]." The commentary also states that the visitor intimidation allegation is an "unsubstantiated charge" con-

APPENDIX A.

cerning an activity which "* * * just doesn't happen in the United States of America."

The licensee asserts that Mr. Putnam's statements concerning you do not constitute personal attack; that the Putnam commentary comes within the exemption of the personal attack doctrine in that it was made during the course of a news broadcast; that, as a Communist, you do not have the right to time to reply, citing *Tri-State Broadcasting Co., Inc.*, 40 FCC 508 (1962), and *Storer Broadcasting Co. (DuBois Clubs)*, 11 FCC 2d 678 (1968); and finally that the personal attack doctrine does not apply because the commentary was not made "during the discussion of a controversial issue of public importance."

Complainant, on the other hand, argues that personal attack was made by implication; that commentary, although given during a news broadcast, was an "editorial portion thereof involving the statement of opinions;" that the role played by you as a Communist is a matter of a "controversial nature and of public importance" (e.g., alleged lack of patriotism, absence of integrity), and that the *Tri-State Broadcasting Co., Inc.* case is inapplicable because here an *individual* communist was attacked.

First, it is clear that the personal attack rules are in any event inapplicable. The rules specifically exempt from their scope commentary which is part of a bona fide newscast. That is the situation here.

The matter thus turns on the applicability of the fairness doctrine to Mr. Putnam's commentary. Under established policy (see Report and Order 12 FCC 2d 250, 252–3, par. 5 (1968)), the licensee itself may present the contrasting viewpoint. For example, a licensee which had reasonably discussed both sides of an issue in its programming, could add a short editorial stating its viewpoint on the issue, without being required to extend opportunities for discussion.

With this as background, we turn to the facts of this case. First, we note the licensee's judgment that the matter which you claim to be a controversial issue of public importance—the role played by you as a Communist—is not an issue of public importance in its area. In this connection, we have considered a second factor—that Mr. Putnam devoted considerable time in his commentary to reciting your views as expressed in the *Times* article (i.e., nine out of 19 paragraphs in his commentary). We wish to make clear that we do not believe that fairness can be achieved by relying upon the person making the criticism or attack to present the other side. See *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, n. 18, quoting J. S. Mill, On Liberty 32. If this were the sole issue in the case, we would not therefore accord it decisional significance. However, here it is not the sole issue. We believe that we can take the above noted factor into account in evaluating the need for action in this case, and specifically, whether we should find unreasonable the licensee's judgment as to the public significance of your role as a Communist, in circumstances where your views have been put before the public to a significant extent. The combined force of these considerations (i.e., the showing (or lack thereof) before us on controversial issues of public importance: the devotion of significant time to setting forth your views, indeed to an

unusual extent in this kind of critical commentary) leads us to conclude that no further action is warranted. Under a standard of reasonableness, a case such as this should, we believe, be resolved in the licensee's favor. We stress that the matter is one of applying the standard of reasonableness to the facts of the case—and not what the complainant, or the Commission, or some other entity might have done or preferred in the exercise of their discretion.

Accordingly, your request is denied.

Commissioner Bartley concurring in the result; Commissioners Cox and Johnson dissenting and issuing separate statements.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

Dissenting Statement of Commissioner Kenneth A. Cox

I cannot agree either with the majority's result or the very brief and inadequate rationale they have advanced to justify it. I therefore dissent.

I agree that the personal attack *rules* do not apply here because the attack complained of took place during a newscast, which brings it within an express exemption to the rules. However, when we added the exemptions, we made it clear that the basic fairness *doctrine* applies to personal attacks in newscasts and other exempt programs. See 12 FCC 2d 250 at 252–253 and Note to the revised rule. So KTTV should permit Mrs. Healey to respond to Mr. Putnam's comments *if* the latter constituted an attack upon her "honesty, character, integrity or like personal qualities" and *if* they were made "during the presentation of views on a controversial issue of public importance."

The majority tacitly concede that what Mr. Putnam said constituted a personal attack upon Mrs. Healey. Indeed, it is clear that he charged her with being unpatriotic and with lying in claiming that parents of young people who have visited her are visited and threatened with the loss of their jobs if their children continue their visits. These are obviously attacks upon her character.

The only remaining question is whether the attack was made in the course of presenting a controversial issue of public importance. The majority do not rule that it was not. They recite the licensee's claim that the commentary was not made during the discussion of a controversial issue, but do not find that contention to be valid. Instead, they quickly turn to a "second factor—that Mr. Putnam devoted considerable time in his commentary to reciting . . . [Mrs. Healey's] . . . views as expressed in the Times article." Of course, they immediately go on to say that they "do not believe that fairness can be achieved by relying upon the person making the criticism or attack to present the other side." I agree with that, and with their further statement that if this were the sole issue it would not be of decisional significance.

At this point it seems clear to me that logic and justice require them to return to the disputed question of whether the attack took place in a controversial issue setting, thus giving rise to a right of

reply. But they never face that issue. Instead they say, without explanation or citation of authority, that they can take "the above noted factor"—that is, that Mr. Putnam recited Mrs. Healey's views—into account in evaluating the "need for action in this case." I know of no other personal attack case in which we have ever talked of the "need for action." Rather, we have simply taken the facts and ruled whether the words spoken amounted to an attack and whether they were uttered in connection with a controversial issue. If these questions are answered in the affirmative, then the fairness doctrine holds that there is, indeed, a "need" to redress the situation so that the public can hear both sides of the dispute. But the majority are resolutely determined not to proceed in the normal way and in accordance with our precedents because they do not like the result which such a course dictates.

So they press ahead, stating that this "factor"—though not itself decisionally significant—can be used in some mysterious way to decide whether to question the licensee's judgment as to the public significance of Mrs. Healey's role as a Communist. Mr. Putnam's recital could not achieve fairness, and I fail to see that it has any relevance to the question of whether he was engaged in discussing a controversial issue. Indeed, the majority do not really use it to decide that question. They simply restate this whole fuzzy concept once more, as follows:

> The combined force of these considerations (i.e., the showing (or lack thereof) before us on controversial issues of public importance: the devotion of significant time to setting forth * * * [Mrs. Healey's] * * * views, indeed to an unusual extent in this kind of critical commentary) leads us to conclude that no further action is warranted. Under a standard of reasonableness, a case such as this should, we believe, be resolved in the licensee's favor.

I think this is sheer obfuscation. What is the "showing (or lack thereof)" on the question of whether a controversial issue was involved here? The majority never say. Why does the fact that significant time was devoted to Mrs. Healey's views—simply so Mr. Putnam could criticize and ridicule them, which the majority say is not, by itself, of decisional importance—even when added to the licensee's mere claim that no controversial issue was presented, lead to a decision to take no action? It is not even remotely clear to me, and the majority offer no explanation. This all seems to me like prestidigitation—now you see it, now you don't—rather than a proper statement of the grounds for agency action. Or to use another metaphor, the majority add zero to zero and get infinity.

I think all of this is intended to obscure the fact that Mr. Putnam's attack *was* in connection with two controversial issues of public importance. First, there was controversy over the question of whether a Communist can, at the same time, be a patriotic American. Second, there was controversy over the claim that Mrs. Healey had been subjected to surveillance and that parents of young people who visited her were threatened with loss of their jobs. That these issues were of public importance is evidenced by the fact that the *Los Angeles Times* devoted a front page story to these matters which occupied eight single spaced typed pages in the item presented to the Commission. It is further demonstrated by the fact that Mr. Putnam, the following evening, spent substantial time disputing the viewpoint of the *Times'*

story and ridiculing and attacking Mrs. Healey. A typed transcript of his comments runs to two and a half single spaced pages.[1] It seems only reasonable to assume that these two major media of communications in our second largest city would not devote so much attention to these issues if they were not of importance in the community. And I think most people would agree that these questions are intrinsically as important as many others which we have found to call for application of the fairness doctrine. So on the critical question of whether or not Mr. Putnam's attacks took place in the context of a significant controversial issue, I think the answer must be in the affirmative. I certainly find no persuasive justification for a contrary view in the majority's opinion.

The licensee cites *Tri-State Broadcasting Co., Inc.*, 40 FCC 508 (1962) and *Storer Broadcasting Co.*, 11 FCC 2d 678 for the proposition that Mrs. Healey, as a Communist, does not have a right to time for reply. The *Storer* case is clearly not in point—in fact, we ruled that an organization charged with being under Communist dominance did have a right of reply. The *Tri-State* case is somewhat ambiguous, containing a sentence which reads: "As you know, it was not and is not the intention of the Commission that you make time available to communists or the communist viewpoint." However, I was the Chief of the Broadcast Bureau when the letter to *Tri-State* was written and recall the matter clearly. We had received a complaint—one of a number involving the same kind of situation—that the station had broadcast a half-hour film entitled "Communist Encirclement—1961" which was alleged to be a vehicle for "ultra-rightist dogma." The Commission reviewed a transcript of the program and said:

> It appears that the program contained a discussion of the following matters, among others: socialistic forms of government were viewed as a transitory form of government which lead eventually to communism; that this country's continuing foreign policy in the Far East and Latin America, the San Francisco student riots, the alleged infiltration of our government by communists and the alleged moral weakening in our homes, schools and churches have all contributed to the alleged advance of international communism. We are of the view that these matters raise controversial issues of public importance.

When queried about the matter, the station—like others which had presented similar programs—responded that it regarded the film as anti-communist and that it did not believe the Commission wanted it to put Communists on in reply. However, there was no suggestion that the complainants in cases of this kind were Communists—they simply disagreed with the version of recent history reflected in films of this kind and with the conclusions drawn therefrom as to the policies the United States should pursue. It was in this context that the Commission wrote the sentence first quoted above, then going on to say:

> You will recognize, however, that there are varying views existent with respect to the most effective and proper method of combatting Communism and Communist infiltration and that broadcasts of proposals supporting one method raise the question whether reasonable opportunity has been afforded for the expression on the station of opposing viewpoints.

[1] It is clear that a good deal of Mr. Putnam's animosity was directed toward the *Times*. However, I don't think Mrs. Healey should be injured in this cross-fire and left without recourse, nor should the audience of KTTV be left with only one side of the controversy.

Thus, the Commission was simply saying that there was no obligation to make time available for the Communist viewpoint in that case. It was not announcing a general policy that Communists can never have a right to present their point of view under any circumstances. Indeed, I think any policy which barred them from responding to personal attacks would violate the First Amendment. While in many communities—and on many issues—there may not be a significant Communist viewpoint entitled to air time under the Fairness Doctrine, there may be situations in which the public should hear that point of view along with those of other significant elements in the community. But I think the situation is different when a licensee directly attacks individual Communists, and I believe that the public should hear Mrs. Healey's side of the controversy over whether she, as a Communist, can also be a patriotic American and whether she and her visitors have been subjected to surveillance.[2] The majority do not appear to rely on the Tri-State case here.

I am at something of a loss to understand the majority's viewpoint. Certainly their letter does not clearly state a basis for their result in anything like the way we normally handle such matters. I think that they have arbitrarily departed from our usual policies simply because of the identity of the complainant. They do not like Communists and recoil from the prospect of ruling that a station should be required to provide time for one. I certainly have no desire to see the airwaves flooded with Communist propaganda, but I think the whole Fairness Doctrine may be imperiled if we do not administer it with complete evenhandedness. Heretofore, we have been at pains to make clear that our fairness policies apply to both extremes of the political spectrum. Compare *Storer Broadcasting Co., supra*, with *John Birch Society Complaint*, 11 FCC 2d 790. See, also, *Capitol Broadcasting Company, Inc.*, 40 FCC 615 and compare *Mid-Florida Television Corporation*, 40 FCC 620, 631. If we do not continue this course, I think the courts will question our competency to enforce the vital requirement that broadcast facilities be used as means for providing the American public with information on both sides of controversial issues of public importance. Metromedia deliberately permitted use of KTTV for an attack upon Mrs. Healey's character in the context of such public controversy. It thereby incurred obligations under the Fairness Doctrine which should be enforced, in accordance with our precedents, even though she is a Communist.

I therefore dissent and am attaching (as Appendix A) a form of letter which I think should have been dispatched to the licensee.

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[2] It should be made clear that, if given time, Mrs. Healey should confine herself to the attacks against her by Mr. Putnam and would not be allowed simply to espouse communism. The licensee can reasonably insist that any response deal with the specific issues raised—the redeeming "patriotic" qualities of a Communist such as Mrs. Healey and the alleged surveillance treatment accorded such people. *Radio Albany, Inc.* (*WALG*), 40 FCC 632 (1965); *Storer Broadcasting Co., supra.*

APPENDIX A

(Preferred Form of Letter)

METROMEDIA, INC.,
Licensee of Station KTTV,
Washington, D.C.

GENTLEMEN: This is in further reference to the complaint of Mrs. Dorothy Healey concerning the comments of Mr. George Putnam on the February 17, 1969 news program, broadcast by station KTTV, Los Angeles, California. The comments were directed to a front-page article on Mrs. Healey in the Los Angeles Times, of February 16, 1969, entitled "Patriot-Marxist—No. 1 Red Finds That U.S. Isn't All Bad."

The Times article, after noting that Mrs. Healey is "a Marxist, a Communist, and an atheist," states that "in some ways Dorothy Healey might be considered an exemplary American and a good member of the bourgeoisie;" that "at 54, she runs her home, pays her taxes, cares for her aged mother, dotes on her scholarly son and generally likes folks, young and old; and that she professes a sincere patriotism and for years, while her son was in school, rarely missed a meeting of the PTA." The article further states that "she has been investigated, prosecuted and persecuted;" that "her house, she says, is bugged, her phone tapped and her mail examined;" and that, according to her, in case after case, the parents of young people who come to her ". . . are visited and threatened with the loss of their jobs if their children come back any more to see me."

Mr. Putnam's commentary disagrees entirely with the *Times'* story and its use of the term "Patriot" in relation to Mrs. Healey. Mr. Putnam states, after reciting Communist horrors and Mrs. Healey's expressed desire to see the American economic system overthrown, that the article is "an insult to American patriotism," and that Mrs. Healey, while "she may be the Los Angeles Times' kind of patriot . . . sure as hell is not [his]." The commentary also states:

> Mrs. Healey makes the following unsubstantiated charge—a charge it is doubtful even she believes—but the LOS ANGELES TIMES publishes it at face value. She says, and I quote, "In case after case, the parents of young people who have visited her are visited and threatened with the loss of their jobs if their children come back any more to see her." Come, come now, Dorothy—perhaps under Communism—perhaps under the Nazis—but it just doesn't happen in the United States of America.

The licensee asserts that Mr. Putnam's statements concerning Mrs. Healey do not constitute personal attack; that the Putnam commentary comes within the exemption of the personal attack doctrine in that it was made during the course of a news broadcast; that, as a Communist, Mrs. Healey does not have the right to time to reply, citing *Tri-State Broadcasting Co., Inc.*, 40 FCC 508 (1962), and *Storer Broadcasting Co., (DuBois Clubs)*, 11 FCC 2d 678 (1968); and finally that the personal attack doctrine does not apply because the commentary was not made "during the discussion of a controversial issue of public importance."

Complainant, on the other hand, argues that personal attack was made by implication; that commentary, although given during a news broadcast, was an "editorial portion thereof involving the statement of opinions;" that the role played by Mrs. Healey as a Communist is a matter of a "controversial nature and of public importance" (e.g., alleged lack of patriotism, absence of integrity), and that the *Tri-State Broadcasting Co., Inc.* case is inapplicable because here an *individual* communist was attacked.

First, we hold that the personal attack *rules* are inapplicable. The rules specifically exempt from their scope commentary which is part of a bona fide newscast. That is the situation here. The issue thus turns on the applicability of the fairness doctrine to Mr. Putnam's commentary.

The *Tri-State* ruling does not make the fairness doctrine inapplicable to this situation. The thrust of that ruling is that licensees are not acting unreasonably when they make the judgment that reference to Communism, in and of itself, does not create a controversial issue of public importance. When a speaker in

a talk or religious program asserts that a totalitarian form of government—for example, Communism or Fascism or anarchy—is bad, there may be small numbers of people who espouse such doctrines. But the existence of such small groups does not mean that one side of an issue of "public importance" (Sec. 315(a) 47 USC 315 (a)) has been presented. Cf *Letter to L.M.C. Smith*, 40 FCC 54 (1963). The letter to *Tri-State* goes on to hold that an allegedly anti-communist program involved controversial issues as to the best methods of combatting communism and that reasonable opportunity should be provided for opposing viewpoints thereon.

But that is the extent of *Tri-State* ruling. It did not hold that no matter what the facts, a Communist could never be given access to broadcast facilities: that there can never be a personal attack or controversial issue of public importance involving a Communist. With this as background, we turn to the specific facts here.

The *Los Angeles Times* story does not deal with the issue of Communism per se. It identifies Mrs. Healey as a high, long-time Communist official and then goes on to raise two issues: (1) whether a Communist such as Mrs. Healey can still have other redeeming "patriotic" qualities, such as being a PTA supporter, etc.; (2) how Communists such as Mrs. Healey are treated (i.e., her allegations of phone tapping, mail examination and intimidation of visitors).

Mr. Putnam, in his broadcast directed to this news story, stated forcefully his position that such a Communist official could not be regarded in any way as "patriotic" or having other "patriotic" qualities and that Mrs. Healey was lying in her allegations concerning such matters as visitor intimidation. It would thus appear that, as a result of the Times' page 1 story and Mr. Putnam's broadcast, issues of public importance have been raised, and that the public should have the opportunity to hear the contrasting viewpoint. The licensee was therefore under an affirmative obligation to encourage and implement the presentation of that viewpoint.

In the circumstances, the licensee cannot properly reject Mrs. Healey on the grounds which it stated. It is her "redeeming qualities" or "patriotism" which Mr. Putnam has put in issue, and it is her statement of the issue as to visitor intimidation, etc., which Mr. Putnam disputes, and indeed claims that Mrs. Healey herself does not believe. On these facts, demonstrating Mrs. Healey's ". . . personal involvement in the controversy" (*Report on Editorializing by Broadcast Licensees*, 13 FCC 1246, 1252 (1949)) Mrs. Healey is clearly the appropriate person to respond (see *Report and Order*, 12 FCC 2d 250, 252–3, para. 5 (1968)) and cannot be rejected on the grounds that she is a Communist. For, under the cited policy, if the licensee does not itself fairly present the contrasting viewpoint, it must afford the person attacked a reasonable opportunity to do so.

In this connection, we also note that no spokesman for the contrasting viewpoint is here entitled to use the opportunity simply to espouse Communism. As stated, that is not the issue: the controversy between the *Los Angeles Times* story and Mr. Putnam's broadcast is not concerned with the merits of Communism. The licensee can reasonably insist that any response deal with the specific issues raised—the redeeming "patriotic" qualities of a Communist such as Mrs. Healey and the alleged nature of the surveillance treatment accorded Communists such as Mrs. Healey. *Radio Albany, Inc.* (*WALG*), 40 FCC 632 (1965); *Storer Broadcasting Co.* (*DuBois Clubs*), *supra*. In that connection, we stress, as we have on prior occasions, that the Commission does not and cannot determine the truth of such issues, and is not indicating any position in that respect. We are not the national arbiter of truth. The Commission's function is simply to insure that in a case such as this, where the licensee has chosen to present one side of an issue of public importance, the public be given the opportunity to hear the other side, and thus be informed, so it—not a Government agency such as the Commission—will make whatever judgment is called for.

In view of the foregoing, we find that the licensee has not complied with the requirements of the fairness doctrine. We therefore direct that you respond within 30 days as to what steps you have taken to come into compliance.

BY DIRECTION OF THE COMMISSION,
BEN F. WAPLE, *Secretary*.

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

In its continuing battle against an "overdose of tolerance,"[1] this Commission has shown a marked disinclination to extend the protection of the Fairness Doctrine to "unpopular" causes.[2] The Communist Party is a leading example of a group which the Commission has singled out as particularly undeserving of the right to verbal self-defense.

In 1962 the Commission found that allegations of communist "infiltration" of government, churches, homes and schools did "raise controversial issues of public importance"—but hastened to assure the public that the Commission certainly did not intend to "make time available to communists or the communist viewpoint."[3] In 1968, however, we held that while Communists could not invoke the Fairness Doctrine, groups *accused* of being communist could—presumably because the seriousness of the allegation entitled the maligned group to "clear its name."[4] Today we hold that broadcasters may accuse named individuals of lying and other "unpatriotic" behavior—so long as those individuals are members of the Communist Party—and that the persons attacked have no right of reply. This is discrimination inconsistent with the Fairness Doctrine and the Constitution.

I dissent.

On February 16, 1969, the *Los Angeles Times* published a front-page feature article on Mrs. Dorothy Healey, long-time Chairman of the Southern California branch of the Communist Party. The following day, television station KTTV–TV in Los Angeles broadcast what can only be described as a vicious attack on the character, motives and actions of Mrs. Healey. The full flavor and implication of this "commentary" can only be obtained by reading the text in its entirety. (See Appendix.) Pertinent excerpts from Mr. Putnam's monologue, however, follow:

> Now listen, if you will, to just a portion of what the LOS ANGELES TIMES has to say about their front page patriot, Dorothy Healey. "In some ways," says the TIMES, "Dorothy Healey might be considered an exemplary American—she owns her home, pays her taxes, cares for her aged mother, dotes on her scholarly son. She professes a sincere patriotism, and she rarely missed a meeting of the P.T.A."
>
> * * * * * * *
>
> Mrs. Healey tells of the night she heard the report read concerning Joseph Stalin's horrors. The report released by Nikita Khruchchev. And Mrs. Healey tells the TIMES that she sobbed all night long. She just never believed those stories.
>
> One can't help but wonder if she might have lost another night's sleep had Khrushchev told us of his own extermination of millions of Ukranians by systematic starvation. Wonder if she ever heard about that?
>
> * * * * * * *
>
> Well, in that lengthy and boring TIMES story she tells of her home and her office being bugged—of telling her visitors never to mention their names when they visit her. Actually, Mrs. Healey should be right at home with such tactics—because they're all too commonplace among the Communists.
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[1] Storer Broadcasting Co. (DuBois Club), 11 F.C.C. 2d 678, 681 (1968) (Commissioner Robert E. Lee, dissenting).

[2] For a recent example, see Letter to Mr. Donald A. Jelinek, FCC 70–595 (released June 4, 1970).

[3] Tri-State Broadcasting Co., Inc., 40 F.C.C. 508, 3 P & F Radio Reg. 2d 175 (1962).

[4] Storer Broadcasting Co. (DuBois Club), 11 F.C.C. 2d 678 (1968).

Mrs. Healey makes the following unsubstantiated charge—a charge it is doubtful even she believes—but the LOS ANGELES TIMES publishes it at face value. She says, and I quote, "In case after case, the parents of young people who have visited her are visited and threatened with the loss of their jobs if their children come back any more to see her." Come, come, now Dorothy—perhaps under Communism—perhaps under the Nazis—but it just doesn't happen in the United States of America.

* * * * * * *

Dorothy Healey may be the LOS ANGELES TIMES' kind of exemplary American, who professes sincere patriotism—she may be the LOS ANGELES TIMES' kind of patriot—but she sure as hell is not mine. And, my fellow Americans, I trust she is not yours.[5]

Mrs. Healey filed a Fairness Doctrine complaint approximately one month later, March 26, 1969, stating that the licensee had refused to grant her time to reply to Mr. Putnam's attack, and asking the Commission for relief. Now, one and a half years later, we deny that relief.

In its decision, the Commission majority makes two arguments: first, that the role played by Mrs. Healey as a Communist is not a controversial issue of public importance; and second, that Mr. Putnam to some extent presented Mrs. Healey's viewpoint (and therefore lessened KTTV–TV's Fairness Doctrine obligation) by quoting favorable portions from the *Los Angeles Times* article. Both these arguments are faulty.

The portions of Mr. Putnam's remarks set out in the text raise at least two issues of fundamental public importance and controversy. The first is whether mere membership in a particular organization, such as the Communist Party, is sufficient to justify the inference that the person in question therefore possesses an undesirable character. Thus, Mr. Putnam indicates that Mrs. Healey is a member of the Communist Party, and *because* of that: (1) she is a liar [who makes "unsubstantiated charges"]; (2) she is guilty of hypocrisy and deceit [e.g., attending P.T.A. meetings under the guise of concern for her son]; (3) she is callous and cruel [failing to lose sleep over Khruschev's "extermination of millions"]; (4) she is implicated in illegal conduct [bugging, wire-tapping, etc.]; and (5) she is generally not a "patriot." The important point to note is not just that the remarks comprise a personal attack on the honesty, character, integrity or like personal qualities of Mrs. Healey, an identified individual. Rather, the remarks attack Mrs. Healey *because* of qualities that presumably adhere to all members of her organization. There is a word for this technique, and that is "guilt by association." Thus, Mr. Putnam accuses Mrs. Healey of close familiarity with tactics of illegal eavesdropping

[5] This attack is virtually identical to, if not substantially worse than, the one made on Fred J. Cook by the Reverend Billy James Hargis—which formed the basis for the Supreme Court's affirmation of the Commission's Fairness Doctrine. For pertinent textural portions of the Hargis attack, *see* Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367, 371 n. 2 (1969). I cannot distinguish the Hargis attack from the present one—except by observing that Cook was not a member of the communist party, whereas Mrs. Healey is. The principle that emerges is a disquieting one: the Fairness Doctrine permits non-communists to argue that they are not communists, *see* Storer Broadcasting Co. (DuBois Club), 11 F.C.C. 2d 678 (1968), and *cf.* Red Lion, *supra*, but it does not permit communists to argue that they are not undesirable or dangerous people. *see* Tri-State Broadcasting Co., Inc., 40 F.C.C. 503, 3 P & F Radio Reg. 2d 175 (1962), and the instant case. Yet presumably the justification for permitting the argument that one is not a communist is precisely that communists (as a group) are undesirable or dangerous people.

or "bugging" by saying: "Actually, Mrs. Healey should be right at home with such tactics—*because they're all too commonplace among the Communists.*" (Emphasis added.) And later: "Come, come, now Dorothy—*perhaps under Communism*—perhaps under the Nazis—but it just doesn't happen in the United States of America." (Emphasis added.)

There is little question that individual character guilt imputed from mere association with the Communist Party has been one of the most controversial issues our country has ever faced. The McCarthy purges in the 1950's pilloried thousands of schoolteachers, ministers, labor union leaders, screen writers, government officials, and members of the military, not for what they had done (in most cases they had done nothing and were in all other respects exemplary citizens), but for what they had *joined*. Unfortunately, the scars of that dreadful era have by no means healed. One need only consult the daily newspapers to find teachers being dismissed because of Communist Party affiliation. See *New York Times*, June 20, 1970, p. C–59, cols. 1–4 (Professor Angela Davis, University of California at Los Angeles).

Supreme Court decisions during the past twenty years provide perhaps the clearest evidence that the consequences of mere Communist Party affiliation are, indeed, a "controversial issue of public importance." In a famous line of cases, the Court has ruled that persons cannot be disqualified from employment or subjected to other forms of harrassment merely because they have at one time been members of the Communist Party. More must be shown—namely, that the goals of the organization are illegal; that the individual *knew* of such goals; that the individual member had the *specific intent* to further those goals; and (most importantly) that the individual took some *action* to further those illegal goals. See, *e.g.*, *Scales v. United States*, 367 U.S. 203 (1961). Dozens of cases, therefore, have established one of our nation's most important principles of individual liberty and association: that the "cherished freedom of association" cannot be abridged by sanctions which punish those "who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities. . . ." *Elfbrandt v. Russell*, 384 U.S. 11, 11 (1966). Illegal *activity* cannot be imputed to a person for mere membership in any particular organization. See, *e.g.*, *United States v. Robel*, 389 U.S. 258 (1967) (defense plant employees); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (schoolteachers); *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957) (attorneys); see generally, *Scales v. United States*, 367 U.S. 203 (1961).

The point is simply this. Mr. Putnam's commentary impugned the motives, conduct, integrity and patriotism of a named individual, Mrs. Dorothy Healey, *because she was a member of the Communist Party*. In so doing he raised one of the most serious issues our nation has had to face: whether society should heap disapprobation upon individuals merely because they are associated with various unpopular organizations. Can a Communist Party member, such as Mrs. Healey, have the "redeeming" social qualities of patriotism, honesty, integrity and compassion for other human beings to which the *Los Angeles Times* referred? Mr. Putnam and KTTV–TV apparently feel

such a member cannot. I believe, at least, that a right of reply is invoked.

A second issue of controversy and public importance raised by Mr. Putnam's broadcast is how the Government treats Communists, such as Mrs. Healey. In his commentary Mr. Putnam hotly denied the charge by Mrs. Healey that "[i]n case after case, the parents of young people who have visited her are visited and threatened with the loss of their jobs if their children come back any more to see her." "Come, come, now Dorothy," he said, "perhaps under Communism—perhaps under the Nazis—but it just doesn't happen in the United States of America." Equal contempt was shown against her allegations of phone tapping and mail examination.

Again, I do not believe it is possible to argue that Government surveillance and treatment of minority and unpopular political parties in this country is not an issue of great controversy and public importance. One need only consult the daily newspaper to find repeated instances of such government misconduct. See, *e.g.*, *The Washington Post*, July 9, 1970, p. A–1 (Internal Revenue Service surveillance of public library readers). We know that Congress has authorized law enforcement officials to wiretap private conversations: we know that wiretapping is regularly used by the government to maintain surveillance over certain persons viewed as "nonconformist": and we know there is extreme public controversy over privacy of communications—certainly an issue of great public importance.

To argue, therefore, as does the majority, that Mr. Putnam's commentary did not raise issues of controversy and public importance is simply to define such issues out of existence.[6] The issues involved here are not merely "the role played by [Mrs. Healey] . . . as a Communist," as the majority contends. It is almost precisely the converse: the role played by Communists in general, as exemplified by the alleged activities of one person, and the treatment such persons receive as a group at the hands of our government.

The Commission also argues that a "second factor" is, in some obscure way, influential to its decision. Because Mr. Putnam supposedly "devoted considerable time" in his commentary to reciting Mrs. Healey's views, the majority feels that the need to grant Mrs. Healey the protection of the Fairness Doctrine is lessened. Yet this argument does no more than bootstrap the majority out of one untenable position into another. Unwilling to establish this position as a separate and independent ground against Mrs. Healey, and unable seriously to contend that the broadcast did not raise controversial issues of public importance (the majority devotes one-half of one sentence to this contention, merely stating its argument as its conclusion), the majority somehow attempts to alchemize two untenable positions into a valid or even plausible one. Its uneasy amalgam fails.

Although the *Los Angeles Times* devoted hundreds of column inches to the Healey story—the longest story in the *Times*' entire Sunday edition—Mr. Putnam quoted no more than eight sentences from it, and devoted more than seven times that attention to his own view. Of

[6] A procedure at which the Commission is becoming increasingly expert. *See* Letter to Mr. Donald A. Helinek, FCC 70–595 (released June 4, 1970) (dissenting opinion).

even greater significance, however, is the manner in which he presented his commentary—beginning with three paragraphs of inflammatory rhetoric ("if I were a young lad back from Vietnam, lying in one of our Veterans' hospitals—a leg gone—an arm missing—blind or faceless—from the horrors of that war . . ., I would be shocked into rage by the story that appeared . . . in the *Los Angeles Times* . . .," etc.), and then quoting (out of context) only those portions of the story most adverse to Mrs. Healey.

The Commission should not negate the Fairness Doctrine whenever the speaker presents the opposing view as only a stalking horse for attack. *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 392 n. 18 (1969). The fairness doctrine is not met by any licensee who says, "John Smith claims he's not a crook, but let me tell you why he is"—and then proceeds to attack the honesty and integrity of Smith. As we said in our *Report on Editorializing by Broadcast Licensee*, 13 F.C.C. 1246, 1253 (1949), the licensee may not " 'stack the cards' by a deliberate selection of spokesmen for opposing points of view to favor one viewpoint at the expense of the other . . . ."

If the majority is unwilling to let its "second" argument stand on its own, it cannot use it to buttress the position that no issue of controversy is involved. Indeed, precisely the opposite may occur: by merely *stating* the attacked position, the licensee may at least indicate the existence of a controversy, or even create or intensify one.

There is little doubt that Mr. Putnam's commentary constituted a "personal attack" upon Mrs. Healey—that is, it attacked her "honesty, character, integrity" and "like personal qualities." See 47 C.F.R. 73, 123 (Personal Attack Rules). There is equally little doubt that the attack was made during the discussion of several issues of public importance and controversy. The formal Personal Attack Rules contained in 47 C.F.R. 73.123, however, do not apply to Mr. Putnam's broadcast—principally because 47 C.F.R. 73.123(b)(3) exempts "commentary or analysis" contained in "bona fide newscasts." Although we have been given no direct evidence that the commentary in question was contained within a "bona fide newscast," all parties seem to concede this, and therefore I concur in the majority's position that our codified Personal Attack Rules do not protect Mrs. Healey.

However, a Note to 47 C.F.R. 73.123(b)(3) specifically provides that the fairness doctrine nevertheless applies to personal attacks otherwise exempted by Section 73.123(b)(3). We spelled this out quite clearly in our *Memorandum Opinion and Order*, 12 F.C.C. 2d 250 (1968), adding subsection (b)(3) to section 73.123(b). There we stated that the Fairness Doctrine nevertheless applied to situations exempted from the more technical requirements (notification, transcripts, etc.) of the Personal Attack Doctrine:

> As stated, the *Fairness Doctrine* is applicable to these exempt categories. Under that doctrine, the licensee has an *affirmative duty* generally to encourage and implement the broadcast of contrasting viewpoints. . . . Under our revision with respect to the exempt categories, the licensee may choose fairly to present the viewpoint of the person or group attacked on the attack facet of the issue; in that event. . . . the [fairness] doctrine is satisfied. *But if the licensee has not done so or made plans to do so*, the affirmative duty referred to above comes into play. And here it obviously is not appropriate for the licensee to make

> general offers of time for contrasting viewpoints, either over the air or in other ways in his community. *There is a clear and appropriate spokesman to present the other side of the attack issue—the person or group attacked.* Thus, our revision affords the licensee considerable leeway in these news type programs but it still requires that fairness be met, either by the licensee's action of fairly presenting the contrasting viewpoint on the attack issue or by notifying and allowing the person or group attacked a reasonable opportunity to respond. [Emphasis added.]

Memorandum Opinion and Order, 12 F.C.C. 2d 250, 252–53, par. 5 (1968).

According to this clearly enunciated doctrine, the licensee cannot reject Mrs. Healey's request for rebuttal time. Mr. Putnam has placed her "redeeming qualities" or "patriotism" in issue, and it is her statement on the issue of visitor intimidation that Mr. Putnam disputes—indeed, claims that Mrs. Healey herself does not believe. The licensee has taken no steps to satisfy its fairness doctrine obligation in this regard. Therefore, Mrs. Healey is the only "clear and appropriate spokesman to present the other side. . . ." The fairness doctrine can be satisfied in no other way.

In sum, the Commission's Personal Attack Rules are merely one "aspect of the fairness doctrine. . . ." *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 373 (1969). Although the Personal Attack Rules were first codified in 1967, the doctrines they embody are of long standing. See *Red Lion, supra* at 375–79. Prior to the 1968 Personal Attack Rules amendments, see *Memorandum Opinion and Order*, 12 F.C.C. 2d 250 (1968), therefore, it is clear that Mrs. Healey would have been permitted time to reply to the attack made upon her. Yet those 1968 amendments suspended only the more technical aspects of the Personal Attack Rules—such as formal notification and proffer of scripts. See 47 C.F.R. 73. 123(a). They did not alter or in any way affect the obligation to offer an attacked person rebuttal time under the long established case law of the fairness doctrine. Given Mrs. Healey's "personal involvement in the controversy," *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1252 (1949), therefore, Mrs. Healey's response is the only method for satisfying the fairness doctrine. *Memorandum Opinion and Order*, 12 F.C.C. 2d 250, 252–53, par. 5 (1968); see *Letter to Mr. Nicholas Zapple*, FCC 70–598, p. 2 (released June 3, 1970). Pursuant to our *Memorandum Opinion and Order*, 12 F.C.C. 2d 250, 252–53, par. 5 (1968), if the licensee does not itself fairly present the contrasting viewpoint (which KTTV–TV has not done here), it must afford the person attacked (Mrs. Healey) a reasonable opportunity to do so.

Several disturbing aspects of this case remain. One is the Commission's tardiness. Almost a year and a half have passed since Mr. Putnam's broadcast. Yet during that time Mrs. Healey has been unable to obtain even an appealable order from this Commission. Even if she should seek and obtain judicial reversal of the Commission's action, her victory would be pyrrhic indeed—the stale assurance of a few minutes of airtime to rebut charges made at least two years earlier. As Supreme Court Justice Harlan has observed, procedural delays may become so severe that they violate substantive rights:

> It is vital to the operation of democratic government that the citizens have facts and ideas on important issues before them. A delay of even a day or two

may be of crucial importance in some instances. (*A Quantity of Books v. Kansas*, 378 U.S. 205, 215, 224 (1964) (dissenting opinion).)

> [T]iming is of the essence in politics. It is almost impossible to predict the political future; and when an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all. . . . [A]pplications must be handled on an expedited basis so that rights of political expression will not be lost in a maze of cumbersome and slow-moving procedures. (*Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 159, 163 (1969) (concurring opinion).)

In areas vital to the full expression of First Amendment freedoms, such as the Commission's administration of the Fairness Doctrine, our procedures must show "the necessary sensitivity to freedom of expression." See *Freedman v. Maryland*, 380 U.S. 51, 58 (1965). In this we have clearly failed.[1]

A second disturbing aspect of this case is the majority's failure to provide *any* justification for its view that no controversial issue of public importance was raised by Mr. Putnam's broadcast. I have carefully read the majority's opinion, and so far as I can determine, its total reasoning on this point is contained in the following sentences:

> With this as background, we turn to the facts of this case. First, we note the licensee's judgment that the matter which you [Mrs. Healey] claim to be a controversial issue of public importance—the role played by you as a Communist—is not an issue of public importance in its area.

This statement is noteworthy on two grounds. First, the majority completely defers to "the licensee's judgment." At no point does the majority indicate even that it *has* a view on the fundamental issue; it merely "notes" the licensee's judgment and passes on to other considerations. I have elsewhere objected to this deference, and will not repeat my arguments here. See *Letter to Mr. Donald A. Jelinek*, FCC 70-597, pp. 8-9 (June 4, 1970) (dissenting opinion). Second, the majority has failed entirely to justify its conclusion; it merely states its result without argumentation. I do not believe the First Amendment can tolerate such a cavalier use of arbitrary power, and suspect the majority's decision is reversible on this ground alone. The Supreme Court has written that "only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression. . . ." *Freedman* v. *Maryland*, 380 U.S. 51, 58 (1965). The majority's failure to grapple with, much less even enunciate, the issues involved here amply illustrate the truth of that statement.

A third disturbing aspect of this case is its implication that the Commission will not apply the Fairness Doctrine even-handedly, but will deny its benefits to those groups a majority of Commissioners find "subversive." In *Storer Broadcasting Co.*, 11 F.C.C. 2d 678 (1968), Commissioner Robert E. Lee wrote in dissent that the Commission

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[1] In Robinson v. Coopwood, 292 F. Supp. 926 (N.D. Miss. 1968), *aff'd per curiam*, No. 27,275 (5th Cir., Oct. 22, 1969), for example, a federal court struck down as unconstitutional a municipal ordinance requiring civil rights demonstrators to give the police *one hour's notice* before marching on the community's public streets. The Court thought that even a one hour's delay exerted a "stifling effect" on the exercise of First Amendment speech, id. at 930, and that the ordinance acted "as an unconstitutional prior restraint" on such speech, Id. at 932. If a delay of one hour is unconstitutional under certain circumstances, what then of a year and a half's delay? The Commission's unconscionable delays in Fairness Doctrine matters such as this, together with its apparently discriminatory treatment of petitioners depending on their political views, raises serious question whether petitioners ought to be given the right to circumvent the Commission in Fairness Doctrine matters and proceed directly to federal court for relief, with the licensee and FCC carrying the burden of showing that petitioners ought to be denied access to the licensee's facilities. *See* Freedman v. Maryland, 380 U.S. 51 (1965).

should not permit the DuBois Club to rebut allegations that it was a communist front organization, stating: "The Fairness Doctrine ends at the international border and I would not take the responsibility of turning the microphone over to those who would advocate the overthrow of the Government by other than the democratic process." *Id.* at 681. I believe the results in this case can only be rationalized by an acceptance of Commissioner Lee's position in *Storer*. See *Storer Broadcasting Co., supra; Tri-State Broadcasting Co., Inc.*, 40 F.C.C. 508, 3 P & F Radio Reg. 2d 175 (1962). I cannot support such a position. If in fact the Commission majority has adopted Commissioner Lee's position, I am left with a profound uneasiness at this Commission's ability to administer the Fairness Doctrine. I believe citizens seeking to exercise their rights of speech over the broadcast spectrum are entitled to far better treatment by their government. I dissent.

APPENDIX

PATRIOT-MARXIST

By George Putnam (February 17, 1969)

If I were a soldier or a sailor or a Marine or a young American in the Air Force, serving in Vietnam—wondering if I would live just one more day—if I were a young lad back from Vietnam, lying in one of our Veterans' hospitals—a leg gone—an arm missing—blind—or faceless—from the horrors of that war—if I were a father, mother, brother, sister, wife, son, daughter, or sweetheart—of one of these young Americans who have put their all on the line in the battle against world Communism—if I were one of these, I would be shocked into rage by the story that appeared in the number one column on the number one page of Sunday's LOS ANGELES TIMES.

With this nation of ours confronted by the threat of Communism in Korea, and Vietnam, South America, the Middle East, and throughout all of Europe—with Communist-inspired and directed youth groups attempting to rip the United States apart—with American ships being pirated on the high seas—with American airplanes being hijacked and flown to Communist Cuba—with known Communists teaching in our state supported campuses—with the Communists loudly proclaiming the many ways in which they intend to destroy us and our way of life—with all of this—the LOS ANGELES TIMES chooses to label the Marxist-Communist atheist Dorothy Healey—as a—patriot.

The LOS ANGELES TIMES, which chose not to even mention Abraham Lincoln's birthday—devoted more words to their "patriot-Marxist," Dorothy Healey, in their Sunday edition—and its voluminous—than any other news item or topic. Yes, more space for the Communist Dorothy Healey than the Communist violations of the Tet New Year's observance—or the Berlin crisis—or the tinderbox in the Middle East, or any other top news.

Now listen, if you will, to just a portion of what the LOS ANGELES TIMES has to say about their front page patriot, Dorothy Healey. "In some ways," says the TIMES, "Dorothy Healey might be considered an exemplary American—she owns her home, pays her taxes, cares for her aged mother, dotes on her scholarly son. She professes a sincere patriotism, and she rarely missed a meeting of the P.T.A."

Referring to the secretary, and later chairman, of the Communist Party in Southern California, the LOS ANGELES TIMES states, "Dorothy Healey has been scorned, heckled, ostracized, spied on, and locked up. Dorothy Healey has been investigated, persecuted, and prosecuted—her home bugged—her phone tapped—her mail examined."

And the TIMES continues, "She has the face of an amiable barmaid, quick, light hazel eyes and elfin smile, sandy windblown hair gone to gray. She would not be considered chic by fellow ladies of the P.T.A., but she has a disarming charm."

The LOS ANGELES TIMES then quotes Dorothy Healey as saying of her eighty-four year old mother, Mrs. Barbara Nestor, "Mother is a charter member of the Communist Party. She's really a radical."

Dorothy Healey joined the Young Communist League December first, 1928. When she was fifteen, she was peddling the DAILY WORKER. She was arrested on the streets and carried off to a detention home, where she spent most of her time agitating the other kids.

In 1940, she passed a civil service examination and went to work for the state in San Francisco as a deputy labor commissioner. Three days before Pearl Harbor, her Communist activities and associations were brought out by the State Committee on Un-American Activities, and the Governor then called for her resignation.

She became Communist Party secretary in 1945. In 1949, she was sentenced to eighteen months in jail for refusing to answer questions before a United States Grand Jury. That decision, however, was later reversed.

In 1952, Dorothy Healey and several other Party leaders were sentenced to five years in prison and were fined ten thousand dollars each for conspiracy to teach the overthrow of the government by violence. I want to repeat that—for conspiracy to teach the overthrow of the government by force. She spent four months in the County jail, until her bail was reduced by the higher court. The Supreme Court later set aside the conviction and the indictment was dismissed.

Mrs. Healey tells of the night she heard the report read concerning Joseph Stalin's horrors. The report released by Nikita Khrushchev. And Mrs. Healey tells the TIMES that she sobbed all night long. She just never believed those stories.

One can't help but wonder if she might have lost another night's sleep had Khrushchev told us of his own extermination of millions of Ukrainians by systematic starvation. Wonder if she ever heard about that?

Mrs. Healey took the Oath of Allegiance and ran for Los Angeles County Assessor in 1966. And she received 87,500 votes. "I want to see the economic system overthrown," says she.

Well, in that lengthy and boring TIMES story she tells of her home and her office being bugged—of telling her visitors never to mention their names when they visit her. Actually, Mrs. Healey should be right at home with such tactics—because they're all too commonplace among the Communists.

Mrs. Healey makes the following unsubstantiated charge—a charge it is doubtful even she believes—but the LOS ANGELES TIMES publishes it at face value. She says, and I quote, "In case after case, the parents of young people who have visited her are visited and threatened with the loss of their jobs if their children come back any more to see her." Come, come, now Dorothy—perhaps under Communism—perhaps under the Nazis—but it just doesn't happen in the United States of America.

And so it goes—this long, and as I say, boring tale of the LOS ANGELES TIMES' "Front page patriot." One can only ask—is the LOS ANGELES TIMES now building up on the Marxist-Communist atheist, Dorothy Healey, for one of the LOS ANGELES TIMES "Women of the Year" awards? To be presented, of course, by that other Dorothy.

Dorothy Healey may be the LOS ANGELES TIMES' kind of exemplary American, who professes sincere patriotism—she may be the LOS ANGELES TIMES' kind of patriot—but she sure as hell is not mine. And, my fellow Americans, I trust she is not yours.

And if you are as shocked as I am by this insult to American patriotism, I urge you to let the TIMES hear your voice—loud and clear.

Four-thirty and ten p.m. news reports, KTTV, Channel Eleven.

In The

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DOROTHY HEALEY,

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v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

METROMEDIA, INC.

Intervenor

On Petition for Review of an Order of
The Federal Communications Commission

APPENDIX

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MARGOLIS AND McTERNAN
ATTORNEYS AT LAW
3175 WEST SIXTH STREET
LOS ANGELES, CALIFORNIA 90005
DUNKIRK 5-6111

HARBOR OFFICE
IN ASSOCIATION WITH
GEORGE E. SHIBLEY
239 AVALON BLVD.
WILMINGTON
775-3307
TERMINAL 5-6644

March 26, 1969

326

Federal Communications Commission
Washington, D. C. 20554

Re: Dorothy Healey and Los Angeles Televison Station KTTV, Channel 11

Gentlemen:

Enclosed herewith is a copy of an editorial presented on the above mentioned television station by George Putnam on February 17, 1969. A demand has been made and rejected that Mrs. Healey be given time to reply to the attack upon her. The rejection came in a letter addressed to the undersigned dated March 11, 1969, from Ira J. Goldstein, Assistant General Counsel for the station, stating: "I have reviewed the editorial as well as your letter of March 6, 1969, and it is my opinion that Mrs. Healey is not entitled to any reply." The purpose of this letter is to request that you review this matter and take action calculated to secure for Mrs. Healey time to reply, to which, we submit, she is entitled under the rules and principles established by the F.C.C.

In the first place, your "fairness doctrine" calls for the granting of equal time when "an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group." It would seem clear that the attack upon Mrs. Healey falls within these categories in a number of respects including the following:

1. The editorial statement includes: "One can't help but wonder if she might have lost another night's sleep had Khrushchev told us of his own extermination of millions of Ukrainians by systematic starvation." Certainly by the clearest of implications the assertion is made that Mrs. Healey is of such a character that she has no concern about the question of starvation of millions of persons.

2. Further on in the editorial the statement is made: "Actually, Mrs. Healey should be right at home with such tactics [the bugging of homes and offices]--because they're all too

commonplace among the Communists." Certainly this most clearly indicates that Mrs. Healey knowingly either participates in or supports such practices which constitute crimes.

3. Mr. Putnam refers to a portion of the Los Angeles Times article quoting Mrs. Healey as stating that ". ... the parents of young people who have visited her are visited and threatened with the loss of their jobs if their children come back any more to see her." He goes on to say: "Come, come, now Dorothy--perhaps under Communism--perhaps under the Nazis--but it just doesn't happen in the United States of America." This is a clear implication that either Mrs. Healey or the people she associates with are liars and that Mrs. Healey is aware of this fact and nevertheless repeats the lies. This is certainly a serious attack on her character.

In addition, under the Board's rules and practices because of Mrs. Healey's "personal involvement in the controversy" there is an additional factor to "be considered for elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over a station where otherwise no such obligation would exist." Certainly Mrs. Healey has been attacked both personally and as a member of the Communist Party and her patriotism has been challenged. It is hardly necessary to point out that the fact that Mrs. Healey's views may be unpopular cannot possibly affect her right to reply under the circumstances.

For all of the reasons set forth above, we urge that you give this matter your immediate consideration and that you then take appropriate action.

Very truly yours,

Ben Margolis

BEN MARGOLIS
for
MARGOLIS and McTERNAN

BM:rlp

cc: Mrs. Dorothy Healey

opeiu #30, afl-cio

PATRIOT-MARXIST

By George Putnam
February 17, 1969

If I were a soldier or a sailor or a Marine or a young American in the Air Force, serving in Vietnam--wondering if I would live just one more day--if I were a young lad back from Vietnam, lying in one of our Veterans' hospitals--a leg gone--an arm missing--blind--or faceless--from the horrors of that war--if I were a father, mother, brother, sister, wife, son, daughter, or sweetheart--of one of these young America who have put their all on the line in the battle against world Communism--if I were one of these, I would be shocked into rage by the story that appeared in the number one column on the number one page of Sunday's LOS ANGELES TIMES.

With this nation of ours confronted by the threat of Communism in Korea, and Vietnam, South America, the Middle East, and throughout all of Europe--with Communist-inspired and directed youth groups attempting to rip the United States apart--with American ships being pirated on the high seas--with American airplanes being hijacked and flown to Communist Cuba--with known Communists teaching in our state supported campuses--with the Communists loudly proclaiming the many ways in which they intend to destroy us and our way of life--with all of this--the LOS ANGELES TIMES chooses to label the Marxist-Communist atheist Dorothy Healey--as a--patriot.

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And if you are as shocked as I am by this insult to American patriotism, I urge you to let the TIMES hear your voice--loud and clear.

Four-thirty and ten p.m. news reports, KTTV, Channel Eleven

KTTV- 328-
TV = Pink

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

April 23 1969

IN REPLY REFER TO:
8330-M
C4-85

Metromedia Inc.
KTTV-TV
5746 Sunset Blvd.
Los Angeles, California

In re: Complaint of Margolis and McTernan
Dated March 26, 1969
Against Station KTTV

Gentlemen:

Enclosed is a copy of a complaint sent to the Commission concerning the operation of your station.

The Commission has no independent information concerning this complaint and has made no determination in the matter. In order to assist it in obtaining further information, the Commission requests that you submit your comments, in duplicate, on the complaint within ten days of the date of this letter, and that you furnish a copy of your response to the complainant.

If the complainant wishes to reply to your response, the reply should be submitted in duplicate within seven days of the date complainant receives your response. In order to expedite consideration of this complaint, it is suggested that you and the complainant furnish each other with copies of all further correspondence sent to the Commission.

Sincerely yours,

William B. Ray, Chief
Complaints and Compliance Division
for Chief, Broadcast Bureau

Enclosure

cc: Margolis and McTernan
Attorneys at Law

SIGNED BY ABOVE
MAILED BY
APR 23 1969
MAIL & FILES

=MCD
4/21/69

6

METROMEDIA, INC.
5151 WISCONSIN AVE., N.W.
WASHINGTON, D.C. 20016
TEL. 202-244-5151

THOMAS J. DOUGHERTY
ASSISTANT GENERAL COUNSEL

May 1, 1969

Mr. William B. Ray
Chief, Complaints and Compliance Division
Federal Communications Commission
Washington, D. C. 20554

Re: 8330-M; C4-85

Dear Mr. Ray:

This will refer to your letter dated April 23, 1969, which forwarded a copy of a complaint filed with the Commission by Ben Margolis, Esq., counsel for Mrs. Dorothy Healey. Mr. Margolis alleges that Station KTTV, Los Angeles, California, aired a personal attack against Mrs. Healey during the course of a news broadcast. Attached to Mr. Margolis' letter was an excerpt from the KTTV news broadcast dated February 17, 1969. This excerpt had been furnished to Mr. Margolis by counsel for the station.

As we analyze commentary about which Mr. Margolis has complained, it was a statement relative to the merit of a Los Angeles Times story. In its story, the Times chose to label Mrs. Dorothy Healey, an avowed communist, as a patriot. Our newscaster took issue with this assertion.

In his letter, Mr. Margolis rests his demand for broadcast time upon three statements made in the newscast. Each of these will be treated seriatim.

Margolis' Assertion 1 -- "The editorial statement includes: 'One can't help but wonder if she might have lost another night's sleep had Khrushchev told us of his own extermination of millions of Ukranians by systematic starvation.' Certainly by the clearest of implications the assertion is made that Mrs. Healey is of such a character that she has no concern about the question of starvation of millions of persons."

Answer -- There was no attack here, as is evident by use of the term "implications". We fail to discern any attack on Mrs. Healey's honesty, character, integrity or like personal qualities.

Margolis' Assertion 2 -- "Further on in the editorial the statement is made: 'Actually, Mrs. Healey should be right at home with such tactics (the bugging of homes and offices) -- because they're all too commonplace among the Communists.' Certainly this most clearly indicates that Mrs. Healey knowingly either participates in or supports such practices which constitute crimes."

Answer -- Clearly, there was no statement that Mrs. Healey participates in, or supports, such practices.

Margolis' Assertion 3 -- "Mr. Putnam refers to a portion of the Los Angeles Times article quoting Mrs. Healey as stating that '...the parents of young people who have visited her are visited and threatened with the loss of their jobs if their children come back any more to see her.' He goes on to say: 'Come, come, now Dorothy --perhaps under Communism--perhaps under the Nazis--but it just doesn't happen in the United States of America.' This is a clear implication that either Mrs. Healey or the people she associates with are liars and that Mrs. Healey is aware of this fact and nevertheless repeats the lies. This is certainly a serious attack on her character."

Answer -- Again, the word "implication" is significant. All we read the statement to mean is that these practices do not happen in the United States. Certainly this is not an attack on Dorothy Healey. It is simply a statement -- one man's opinion, if you will -- that this type of harassment is not practiced by our government. We certainly did not utilize the declaration "liar" with reference either to Mrs. Healey or her associates.

Even if this commentary could by some stretch of the imagination be construed as an attack on Dorothy Healey, it is clear that since the statements were made during the course of a news broadcast they are exempt from the Commission's personal attack rules. Moreover, inasmuch as Mrs. Healey is a member of the communist party (see the penultimate paragraph of Mr. Margolis'

letter admitting such membership and belief), she is not entitled to time to reply. Tri-State Broadcasting Co., Inc., 3 Pike & Fischer R.R. 2d 175 (1962). At any rate, even assuming there was an attack, it did not occur during the discussion of a controversial issue of public importance. Cf. Dissenting Opinion of Commissioner Robert E. Lee to letter to Warren C. Zwicky, Esq., dated January 31, 1968. In this connection, the following excerpt from the government's brief in Red Lion Broadcasting Co., Inc. v. United States, S. Ct. Case Nos. 2 and 717 (p. 67) is a propos:

> "At the outset, we stress that the /personal attack/ rule is directed only at a relatively narrow class of cases. First, it applies only to attacks occurring 'during the presentation of views on a controversial issue of public importance.' Thus, no licensee need fear that the rule may be triggered by purely personal attacks in which the public at large has little interest. Second, the Commission has expressly exempted certain classes of programs, including on-the-spot coverage of news events, bona fide newscasts (along with commentary and analysis carried therein) and news interviews, from the coverage of the rule, both because they did not generally give rise to the problems at which the rule is primarily directed and in order to alleviate any possible concern that the rule might unduly interefere /sic/ with such programming."

In view of the foregoing, this is to advise the Commission that we do not feel that we are required to afford Mrs. Healey time on Station KTTV, Los Angeles, California.

Very truly yours,

METROMEDIA, INC.

Thomas J. Dougherty
Assistant Secretary

cc: Ben Margolis, Esq.
Margolis and McTernan
3175 West Sixth Street
Los Angeles, California 90005

Los Angeles Times
Sunday, February 16, 1969

Patriot-Marxist

L. A.'S NO. 1 RED FINDS THAT U. S. ISN'T ALL BAD

By Jack Smith
Times Staff Writer

In some ways Dorothy Healey might be considered an exemplary American and a good member of the bourgeoisie.

She has had three divorces, but otherwise she would appear as blameless as any other woman in her block.

At 54, she owns her home, pays her taxes, cares for her aged mother, dotes on her scholarly son, and generally likes folks, young and old.

She professes a sincere patriotism, and for years, while her son was in school, she rarely missed a meeting of the PTA.

But there is something else.

Mrs. Healey is a Marxist, a Communist and an atheist.

As secretary and then chairman of the Communist party in Southern California, Dorothy Healey has been the resident Communist for 20 years.

In those two decades she has been scorned, heckled, ostracized, spied on and now and then locked up.

Mail Examined

She has been investigated, persecuted and prosecuted. Her house, she says, is bugged, her phone tapped and her mail examined.

She has endured the vigilantism of the Dies, Tenney and McCarthy eras, and has been rescued twice from severe prison sentences by the U. S. Supreme Court.

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,630

DOROTHY HEALEY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

METROMEDIA, INC.,
Intervenor.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

RICHARD W. McLAREN,
Assistant Attorney General,

RICHARD E. WILEY,
General Counsel,

JOHN H. CONLIN,
Associate General Counsel,

RICHARD R. ZARAGOZA,
Counsel.

Department of Justice
Washington, D. C. 20530

Federal Communications Commission
Washington, D. C. 20554

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BRIEF FOR RESPONDENTS

STATEMENT OF ISSUE PRESENTED *

Whether the Federal Communications Commission acted within the range of its discretion when it found Station KTTV-TV was not unreasonable in determining that a controversial issue of public importance was not discussed.

COUNTERSTATEMENT OF THE CASE

Pursuant to 47 U.S.C. 402(a) and 28 U.S.C. 2344, Mrs. Dorothy Healey (hereinafter Mrs. Healey), petitioner

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*/ This case has not previously been before this Court.

herein, seeks review and reversal of the Commission's order and decision,[1] which denied her request that the Commission direct Station KTTV, Los Angeles, California,[2] to afford her an opportunity to respond to a commentary carried by the station.

We believe that Mr. Healey's brief has adequately set forth the factual background of the complaint and therefore adopt her statement of the case with respect to the events leading up to the filing of the complaint with the Commission. However, we believe a further statement regarding the contentions of the parties in the proceeding before the Commission and the pertinent aspect of the fairness doctrine and personal attack rules may be helpful.

A. Contentions Before The Commission.

In her initial complaint to the Commission, Mrs. Healey alleged that Mr. George Putnam's commentary "attacked her both personally and as a member of the Communist Party and her patriotism has been challenged." (A. 2).[3] In response to a Commission inquiry, the station characterized Mr. Putnam's commentary as taking strong issue with the Times' labeling of Mrs. Healey "as a patriot." (A. 7). The station stated that the

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1/ The Commission's order and decision adopted June 24, and released July 31, 1970, is officially reported at 24 F.C.C. 2d 487 (1970).

2/ The licensee of Station KTTV-TV is Metromedia, Inc., intervenor herein.

3/ The text of the Putnam commentary appears at A. 3-5.

statements regarding Mrs. Healey were not directed at her "honesty, character, integrity or like personal quality," and thus did not constitute a personal attack within the meaning of Section 73.679 of the Commission's rules. 47 CFR 73.679. The station further stated that the fairness doctrine did not apply to Mr. Putnam's comments even if they did constitute a personal attack because (1) they were broadcast during an exempt program and (2) they did not involve a controversial issue of public importance. (A. 8-9). Therefore, the fairness doctrine did not apply to the broadcasts.

In a May 27, 1969 reply to the station's response, Mrs. Healey characterized the controversial issue of public importance involved as "the role played by individual communists in our society [which] has been a matter of great public concern as the constant attention of congressional committees, the Justice Department and other branches of government indicates." (A. 18) Mrs. Healey contended that Putnam presented the view that every member of the Communist Party is "unpatriotic, lacks integrity and supports terror and the wiping out of populations" and utilized personal attacks upon Mrs. Healey "as a means of stating his position on this controversial issue." (A. 18) Mrs. Healey requested the opportunity to reply to the statements of Mr. Putnam.

The Commission found that Station KTTV did not act unreasonably in determining the issue discussed by Mr. Putnam, i.e., Mrs. Healey's role as a Communist and her patriotism, were not controversial issues of public importance. (A. 22). The Commission stressed that its determination that the licensee had not abused its discretion represented the application of "the standard of reasonableness to the facts of the case--and not what the complainant, or the Commission, or some other entity might have done or preferred in the exercise of their discretion." (A. 23) The Commission thus concluded that no further action was warranted. Mrs. Healey did not file a petition for reconsideration but instead appealed directly to this Court.

B. Fairness Doctrine And Personal Attack Rules.

Under the fairness doctrine, broadcast licensees are required (1) to devote a reasonable amount of time to the discussion of issues which are controversial and publicly important, either nationally, statewide, or in the station's local service area, and (2) to do so in a fair manner calculated to inform the public on all significant contrasting viewpoints on those issues. See Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1249 (1949); 47 U.S.C. 315(a);[4/]

4/ Section 315(a), 47 U.S.C. 315(a), provides, in pertinent part, that it is an obligation of broadcast licensees "to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

Public Notice of July 6, 1964, entitled Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 40 F.C.C. 598 (1964), (hereinafter called Fairness Primer).[5/]

In applying the fairness doctrine to their day-to-day programming selections, broadcast licensees are "called upon to make reasonable judgments in good faith on the facts of each situation--as to whether a controversial issue of public importance is involved, as to what viewpoints have been or should be presented, as to the format and spokesman to present the viewpoints, and all other facets of such programming" (emphasis supplied). Fairness Primer, supra, 40 F.C.C. at 599. When it promulgated the doctrine, the Commission stated:

> It should be recognized that there can be no one all embracing formula which licensees can hope to apply to insure the fair and balanced presentation of all public issues. Different issues will inevitably require different techniques of presentation and production. Report on Editorializing, supra, 13 F.C.C. at 1251-1252.

For this reason, wide discretion is given a licensee in the making of program judgments. "In passing on any complaint in this area, the Commission's role is not to substitute its

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5/ The Fairness Primer contains past interpretative rulings applying the fairness doctrine and its personal attack aspects (40 F.C.C. at 610-614) to specific fact situations.

judgment for that of the licensee as to any of the above [noted] programming decisions, but rather to determine whether the licensee can be said to have acted reasonably and in good faith." Fairness Primer, supra, 40 F.C.C. 2d at 599.

The personal attack rules are merely a facet of the fairness doctrine which delineates the responsibilities of licensees in situations where the "honesty, character, integrity or like personal qualities of an identified person or group" has been attacked "during the presentation of views on a controversial issue of public importance" (emphasis added). 47 CFR 73.679(a). The personal attack rules differ from the fairness doctrine only in that the licensee is not permitted to exercise his discretion in determining which spokesmen he will choose to present opposing views on controversial issues of public importance. Under the personal attack rules, time must be given to the person attacked in the manner prescribed in the rule. 47 CFR 73.679(a). In adopting the personal attack rules, the Commission specifically emphasized that the rules applied only when an attack occurred during the discussion of a controversial issue of public importance:

Several of the comments in this proceeding indicate the mistaken impression that an attack on a specific person or group constitutes, itself, a controversial issue of public importance requiring the invocation of the Fairness Doctrine. This misconceives the principle, based on the right of the public to be informed as to the vital issues of the day, which requires that an attack must occur within the context of a discussion of a controversial issue of public importance in order to invoke the personal attack principle. The use of broadcast facilities for the airing of mere private disputes and attacks would raise serious public-interest issues, but such issues are not the focus of the Fairness Doctrine. Amendment of Part 73 of the Rules To Provide Procedures in the Event of a Personal Attack or Where a Station Editorializes as to Political Candidates, 8 F.C.C. 2d 721, 725 (1967).

The Commission again emphasized, in a 1968 revision of the personal attack rules, the requirement that the personal attack rules operate only if the fairness doctrine applies to a particular broadcast. See Amendment of Part 73 of the Rules Relating to Procedures in the Event of a Personal Attack, 12 F.C.C. 2d 250, n. 1 (1968).

ARGUMENT

THE COMMISSION REASONABLY FOUND THAT STATION KTTV DID NOT VIOLATE THE FAIRNESS DOCTRINE WHEN IT REFUSED MRS. HEALEY'S REQUEST FOR TIME TO RESPOND TO THE PUTNAM COMMENTARY.

Congress has delegated to the Commission the responsibility for seeing that broadcast stations "operate in the public interest and . . . afford reasonable opportunity for the discussion of conflicting views on issues of public importance." 47 U.S.C. 315(a). It is well-settled that judicial review of Commission action in this area is limited to whether the agency's order is unreasonable or in contravention of the statutory purpose. As recently stated in Eugene J. McCarthy v. F.C.C., 129 U.S. App. D.C. 56, 390 F.2d 471 (1968), "In making this determination, 'this court is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers.'" Citing American Telephone & Telegraph Co. v. United States, 299 U.S. 232 (1936), and Udall v. Tallman, 380 U.S. 1 (1965); Farmers Educational & Cooperative Union v. WDAY, Inc., 360 U.S. 525 (1959); Philadelphia Broadcasting Co. v. F.C.C., 123 U.S. U.S. App. D.C. 298, 299-300, 359 F.2d 282, 283-284 (1966); K. Davis, Administrative Law Treatise, §5.03 (1958). "This is particularly true," the Court emphasized, "where the Commission has been assigned a responsi-

bility of the kind here involved." Id. We submit that the Commission's decision in this case is well "within the bounds" of its discretion and should be affirmed.

A. The Commission Properly Recognizes That Licensees Must Have Latitude In Making Program Judgments.

The underlying rationale of the broadcasting scheme devised by Congress and reflected in the Communications Act of 1934 requires the licensing of private entities to provide program services to the public in individual localities in accordance with their needs and interests. In furtherance of this scheme licensees and potential licensees are called upon to demonstrate diligence in ascertaining the special interests and problems of the community to be served and, on the basis thereof, to select and present program material to meet those needs and interests. Henry v. F.C.C., 112 U.S. App. D.C. 257, 302 F.2d 191, cert. denied, 371 U.S. 821 (1962). This responsibility devolves upon each individual licensee and cannot be delegated by him or unduly fettered in a manner which would restrict the free exercise of his independent judgments. National Broadcasting Co. v. United States, 319 U.S. 190, 205-206 (1943).

With respect to programming in the public interest, the Commission has imposed general affirmative duties, e.g.,

to strike a balance between the various interests of the community, Report on Editorializing, supra, 13 F.C.C. at 1247-1248, and to provide a reasonable amount of time for the presentation of programs devoted to the discussion of public issues, id. at 1249. "The licensee has broad discretion in giving specific content to these duties." Banzhaf v. F.C.C., 132 U.S. App. D.C. 14, 27, 405 F.2d 1082, 1095 (1968), cert. denied sub nom. Tobacco Institute v. F.C.C., 396 U.S. 842 (1969). In reviewing a licensee's compliance with these broad duties, all founded on the public interest standard, "the Commission walks a tightrope between saying too much and saying too little." Id.

These duties have crystallized into what is now called the "fairness doctrine" which imposes upon the individual licensee responsibilities for ascertaining the particular controversial issues of public importance to be covered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented and the spokesman for each point of view. In determining whether to honor specific requests for time, the station will inevitably be confronted with numerous judgments ranging from whether one side of a controversial issue of public importance has been presented to whether a person requesting time to discuss an issue is an appropriate spokesman. Fairness Primer, supra, 40 F.C.C. at 599;

Report on Editorializing, supra, at 1251-1252. The Commission requires only that a licensee in making these judgments act reasonably and in good faith. Id. The Commission is concerned with "overall performance and good faith, rather than specific errors it may find [the licensee] to have made." Banzhaf v. F.C.C., supra, 132 U.S. App. D.C. at 27, 405 F.2d at 1095. The Commission will not substitute its judgment for that of the licensee where these program decisions have been made. Madalyn Murray, 40 F.C.C. 647 (1965); Fairness Primer, supra, 40 F.C.C. at 599.

The Commission's judgment that this limited oversight function is the only sound way to proceed is based upon decades of experience in the field for it prevents the Commission from exercising at will a "free hand to vindicate its own idiosyncratic concept of the public interest." Red Lion Broadcasting Co., Inc. v. F.C.C., supra, 395 U.S. 367, 395 (1969). In applying the fairness doctrine duties, the "day to day decisions . . . are the licensee's responsibility, the ultimate duty to review generally the course of conduct of the station over a period of time and to take appropriate action thereon is vested in the Commission." Mayflower Broadcasting Corp., 8 F.C.C. 333, 340 (1941). See Fairness Primer, supra, 40 F.C.C. at 599; Report of En Banc Programming Inquiry, 20 Pike & Fischer, R.R. 1901 (1960); Report on Editorializing, supra, 13 F.C.C. at 1251. Any closer scrutiny of licensee judgment would not only improperly

involve the Commission itself in broadcast journalism but could also put it in the adminstratively untenable position of overseeing thousands of complaints that represented no more than nuances in tastes or preferences. Such a policy of imposing governmental preferences in fairness doctrine judgments would inhibit rather than promote the discussion and presentation of controversial issues in defiance of the profound national commitment to the principle that debate on public issues should be "uninhibited, robust, wide-open." New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

B. Mrs. Healey Has Not Demonstrated That The Licensee Exhibited Unreasonable Judgment In Concluding That No Controversial Issue Of Public Importance Was Presented.

The sole issue before the Commission in considering Mrs. Healey's complaint was whether the licensee exercised reasonable, good faith judgment in determining that no controversial issue of public importance had been presented in Mr. Putnam's commentary. Mrs. Healey presented no evidence to demonstrate that her own patriotism (1) was a matter of public concern in the licensee's service area, and (2) either at the time of the broadcasts or thereafter, was being

"actively controverted by members of the public." New Broadcasting Co. (WLIB), 40 F.C.C. 439, 440 (1950). In the absence of such evidence, a Commission grant of Mrs. Healey's request would have represented the substitution of the Commission's or Mrs. Healey's judgment for that of the licensee--a course which the Commission has specifically and consistently eschewed. Fairness Primer, supra, 40 F.C.C. at 599; Report on Editorializing, supra, 13 F.C.C. at 1251. Under the circumstances the Commission properly declined to overturn the licensee's judgment that no controversial issue of public importance was presented.[6/]

6/ It should be noted that in reaching the conclusion that no controversial issue of public importance was shown to have been involved, the Commission considered a second factor, "that Mr. Putnam devoted considerable time in his commentary to reciting [Mrs. Healey's] views as expressed in the Times article (i.e., nine out of 19 paragraphs in his commentary)." (A. 22). In assessing the need for further action, the Commission cited Putnam's "devotion of significant time to setting forth [Mrs. Healey's] views, indeed to an unusual extent . . ." which insured that her views were "put before the public to a significant extent." (A. 23). For example, Putnam quotes the Times as saying, "'In some ways . . . Dorothy Healey might be considered an exemplary American--she owns her home, pays her taxes, cares for her aged mother, dotes on her scholarly son. She professes a sincere patriotism, and she rarely missed a meeting of the P.T.A.'" (A. 3). He also went on to cite the Times as stating "'Dorothy Healey has been scorned, heckled, ostracized, spied on, and locked up. Dorothy Healey has been investigated, persecuted, and prosecuted--her home bugged--her phone tapped--her mail examined." (A. 3).

In her brief Mrs. Healey seeks to reformulate the issue which she alleges was presented in Putnam's commentary. Thus, she now argues that Putnam's remarks give rise to the broad and historically troublesome question of "guilt by association" (Br. 8-9). This argument was never presented to the station although the Commission strongly encourages consultation between fairness complainants and licensees to ascertain whether a controversy exists and to sharply narrow and delineate the issues involved prior to Commission consideration. Committee for the Fair Broadcasting of Controversial Issues, 25 F.C.C. 2d 283, n. 2 (1970); Fairness Primer, supra, 40 F.C.C. at 599-600. More important, the argument was never presented to the Commission in these terms and Mrs. Healey is therefore barred from advancing it in this appeal. See 47 U.S.C. 405. 7/

In any event, Mrs. Healey has not demonstrated even now that the broad issue of guilt by association was raised by the Putnam commentary. Significant public controversy may have

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7/ Mrs. Healey had an opportunity to petition for reconsideration (47 CFR 1.106) arguing that Station KTTV or the Commission had misapprehended her view of the issue presented.

attended Mrs. Healey personally in the 1950's and earlier as she seems to suggest (Br. 16). However, the fairness doctrine is concerned not with past controversies but with vital disputes of the day. The doctrine is not triggered by Mrs. Healey's conduct which may have aroused public debate in "1928," "1934," "1949," or "1952" (A. 10-17). It is clear that under certain circumstances a question not controversial and publicly important before its broadcast may after its broadcast "arouse controversy and opposition of a substantial nature which will merit presentation of opposing views." Report on Editorializing, supra, 13 F.C.C. at 1251. However, Mrs. Healey has not shown either the station or the Commission that this was the case.

The only argument advanced by Mrs. Healey to demonstrate that her role as a Communist/patriot constituted a controversial issue of public importance is that the Los Angeles Times and Station KTTV devoted time to discussing it. Mrs. Healey, however, offers no support for the proposition

that merely because a matter is the subject of a newspaper article, it is ipso facto a controversial issue of public importance. If such a theory were valid, presumably literary criticism and movie or theatre reviews if discussed on a radio or television program would constitute controversial issues of public importance, which they clearly do not. Cf. George W. Walker, 26 F.C.C. 2d 238 (1970); David S. Tillson, 24 F.C.C. 2d 297 (1970). The fairness doctrine was intended to protect the public's paramount interest in being fully informed on the "vital public issues of the day" and Mrs. Healey has failed to demonstrate that she is such a "public issue." Report on Editorializing, supra, 13 F.C.C. at 1249.

Because no controversial issue of public importance was presented by Mr. Putnam and the licensee therefore had no unfulfilled obligations under the fairness doctrine, the remaining arguments advanced by Mrs. Healey were rendered moot and were not considered by the Commission. 8/

8/ Mrs. Healey argues (A. 1-2, 18-19; Br. 11-13) that Putnam's commentary contained personal attacks upon "her honesty, character, integrity or like personal qualities." In this regard, the Commission found that even if a controversial issue of public importance had been involved, Putnam's statements were made in a commentary or analysis broadcast during a "bona fide newscast." (A. 22). See 47 CFR 73.679(b)(3). Hence the Commission did not reach, nor was it required to reach, the question whether Putnam's commentary contained "personal attacks." (Mrs. Healey specifically denies that she is contending Putnam's commentary was an "editorial of the licensee" and therefore not exempt from the personal attack rule. (Br. 17)).

C. Mrs. Healey's Remaining Arguments Are Neither Admissible Nor Meritorious.

Mrs. Healey advances the following arguments for the first time: (1) that the Commission has violated her First and Fifth Amendment rights (a) by allegedly denying her relief because of her political association and belief and (b) by arbitrarily singling her out for such treatment (Br. 23-28); and (2) that "'elementary considerations of fairness'" dictate that she be given an opportunity to respond even "'when otherwise no such obligation would exist'" (citing the Report on Editorializing, supra, 13 F.C.C. at 1252; Br. 28-29). These are wholly new legal arguments which the Commission has been given no opportunity to analyse or resolve. Were the manner of their raising not dispositive of these arguments (see 47 U.S.C. 405; United States v. Tucker Truck Lines, 344 U.S. 33 (1952); Presque Isle TV, et al. v. United States, 387 F.2d 502 (1st Cir. 1967)),[9/] their lack of merit would be.

9/ As this Court stated in Florida Gulfcoast Broadcasters, Inc. v. F.C.C., 122 U.S. App. D.C. 250, 252, 352 F.2d 726, 728 (1965):

> "A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the Commission of an opportunity to consider the matter, make its ruling, and state the reason for its action." Unemployment Compensation Commission of Territory of Alaska v. Aragon, 329 U.S. 143, 155, 67 S. Ct. 245, 251, 91 L.ED 136 (1946); see also Albertson v. Federal Communications Commission, 100 U.S. App. D.C. 103, 243 F.2d 209 (1957).

In terms of substance, Mrs. Healey's arguments fare no better. The constitutional argument she advances is totally without foundation. Nowhere in the Commission's decision is there the remotest indication that Mrs. Healey's complaint was denied because of her political association or that the Commission failed to apply established fairness criteria to her complaint (see Arguments A and B, supra). To support her assertion that relief was denied her because of her political affiliation, Mrs. Healey cites the Commission's alleged reliance on two Commission decisions, Tri-State Broadcasting Co., Inc., 40 F.C.C. 508 (1962), and Storer Broadcasting Co., 11 F.C.C. 2d 678 (1962), which she characterizes as standing for the proposition that Communists are not entitled to time to reply to attacks under the fairness doctrine.

The Commission neither relied upon these cases nor upon the proposition for which Mrs. Healey alleges they stand. Nor would the cases cited support the proposition originally advanced by the licensee in its response to the Commission's

inquiry (A. 8-9) and now asserted by Mrs. Healey.[10/] As noted above, the Commission's ruling was based solely upon its determination that the licensee was not shown to have acted unreasonably in finding that no controversial issue of public importance had been presented in the broadcast complained of. The fact that Mrs. Healey is a Communist is irrelevant to the Commission's determination, ". . . the action of the Commission must be governed by legal principles rather than the personal feelings of the Commissioners." Anti-Defamation League of B'Nai B'Rith, 4 F.C.C. 2d 190 (1960).

10/ In her brief (Br. pp. 25-26) Mrs. Healey cites Tri-State Broadcasting Co., Inc., supra, to support the unfounded proposition that the Commission has held that members of the Communist party, because of their affiliation, are not entitled to reply to statements made about them. In Tri-State, the Commission held that where a station discussed "the most effective and proper method of combatting Communism," a controversial issue of public importance, the fairness doctrine does not necessarily require a station to choose a member of a particular group, e.g., Communists, to present opposing viewpoints for it has leeway in choosing the most appropriate spokesman. Id. at 509. However, the station must play "a conscious and positive role in bringing about balanced presentation of opposing viewpoints." Id. There is nothing in Storer Broadcasting Co., supra, (a letter to Warren C. Zwicky, Vice President and Washington counsel, Storer Broadcasting Co.) which is inconsistent with the Tri-State holding. In Storer the Commission held that where the DuBois Club of America was personally attacked as being controlled by Communists, the group has a right to broadcast a reply reasonably related to the attack. Id. at 680. The right of response was upheld irrespective of the truth or falsity of the assertion by the station that the group was a Communist organization.

Mrs. Healey's citation of the 1949 Report on Editorializing, supra, to support her argument that "elementary considerations of fairness" require that she be given time to respond "when otherwise no such obligation would exist" represents a historical misconception. The portion of the Report on Editorializing, (13 F.C.C. at 1252), constituting the "personal attack principle" was the precursor of what was in 1959 codified as the personal attack rule. Red Lion Broadcasting Co., Inc. v. F.C.C., supra, 395 U.S. at 384. Thus, this additional "principle" which Mrs. Healey seeks to invoke is no more than that afforded under the personal attack rules which require that response time be given only when the attack occurs during the discussion of a controversial issue of public importance. 47 CFR 73.679(a). 11/

11/ Mrs. Healey also contends (Br. pp. 29-31) that the Commission's delay in ruling upon her fairness complaint gives rise to an independent right of relief. However, the delay has occasioned no injury to the public since, as we submit, no controversial issue of public importance was involved. The fact that Mrs. Healey may have been personally injured by the statement broadcast is simply not cognizable under the fairness doctrine which is directed solely at the public's right to be informed. Report on Editorializing, supra, 13 F.C.C. at 1249. Mrs. Healey's remedy would more appropriately lie in private civil litigation if the injury claimed is that of libel or slander. In any event, the Commission could fashion no appropriate relief for a strictly private injury. Of course, remedies for libel or slander remain available, without regard to the personal attack rule. Compare Near v. Minnesota, 283 U.S. 699, 709, 718-720 (1931); Farmers Educational Cooperative Union of America, North Dakota Division v. WDAY, Inc., supra; New York Times Co. v. Sullivan, supra.

CONCLUSION

Based on the foregoing analysis and reasoning, the Commission's order should be affirmed.

Respectfully submitted,

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February 5, 1971.

No. 24,630

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DOROTHY HEALEY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,
Respondents,

METROMEDIA, INC.,
Intervenor.

On Petition to Review
An Opinion of the
Federal Communications Commission

BRIEF FOR INTERVENOR METROMEDIA, INC.

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* Cases or authorities chiefly relied upon are marked by asterisks.

QUESTIONS PRESENTED

1. Whether the Court is precluded by the principles of the exhaustion doctrine from considering arguments which Petitioner failed to raise below.

2. Whether the Commission abused its discretion in holding (a) that a personal attack did not occur in the broadcast in question and (b) that the licensee acted reasonably in determining that no controversial issue of public importance was involved in the broadcast.

3. Whether the relief Petitioner seeks in this Court will require judicial modification of a validly adopted administrative rule.

4. Whether the failure of the Commission to act more rapidly on Petitioner's complaint provides Petitioner independent rights vis-a-vis Intervenor.

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BRIEF FOR INTERVENOR METROMEDIA, INC.

By letter[1/] dated June 24, 1970 (released July 31, 1970), the Federal Communications Commission[2/] ("Commission") denied a complaint filed by Dorothy Healey ("Petitioner") against Metromedia,

1/ FCC 70-658; 24 F.C.C. 2d 487 (1970).

2/ Commissioner Bartley concurring in the result, Commissioners Cox and Johnson dissenting and issuing separate statements.

Inc., licensee of Station KTTV(TV), Los Angeles, California.[3] Dorothy Healey filed a petition to review this ruling on September 16, 1970. Metromedia's motion to intervene was granted on October 23, 1970.

COUNTER STATEMENT OF THE CASE

Due to the argumentative nature of the statement of the case presented by Petitioner, it is necessary to present this counter statement in order to place this appeal in the proper factual setting.

On February 16, 1969, The Los Angeles Times published a lengthy and rather laudatory article on Petitioner entitled "L.A.'s No. 1 Red Finds That U.S. Isn't All Bad" (R. 10-17). This article recited that Dorothy Healey was a "Marxist, a Communist and an atheist" and "[a]s secretary and then chairman of the Communist party in Southern California, Dorothy Healey has been the resident Communist for 20 years" (R. 10).[4] The article went on to describe her family life and several of the legal proceedings in which she has been involved (R. 12-14).

3/ Referred to herein as either "Metromedia" or "KTTV".

4/ It appears that Petitioner has fallen from favor in the Communist party organization because of her opposition to the Soviet occupation of Czechoslovakia and has lost her office as chairman of the Southern District. See Report of the Senate Fact-Finding Subcommittee On Un-American Activities to the 1970 Regular Session of the California Legislature (1970), pp. 158-159. This would appear to be confirmed by the affidavit filed by Petitioner in this Court in support of the "Motion For Leave to File Mimeographed Briefs..." dated December 30, 1970.

The article noted that the party membership in Southern California had declined from a high of 5,000 members in 1949 to a then figure of 1,000. This decline was apparently the result of the revelations which occurred at the 20th Soviet Congress, "at which Nikita Khruschev [sic] opened the door on the Joseph Stalin chamber of horrors"(R. 16).

The day following publication of the article in the Times, George Putnam commented[5/] on the article during the 4:30 and 10:00 P.M. news broadcasts on Station KTTV (R. 3-5). The commentary opened with an introductory paragraph which indicated that Putnam was shocked by the Times' publication of the article. He then noted that more space had been devoted to this article than any other news item or topic in that issue. Thereafter, he quoted several laudatory paragraphs from the article and he voiced criticism of other portions of the article (e.g., certain state police tactics occur in other countries but not in the United States). The commentary then questioned the Times' motives and concluded with a suggestion that listeners express their views to the Times. The effective tenor of the commentary was critical of the Times' news judgment in devoting so much space to this type of article.

5/ Petitioner states (Br. p. 5) that the commentary was approximately six minutes in length. Presumably this was computed, since the record is silent on the length of time it took the newscaster to deliver the commentary.

Petitioner demanded time to reply to the commentary. The demand was refused by KTTV. Petitioner then filed a complaint with the Commission (R. 1-2). The complaint was forwarded to Metromedia with instructions to reply within then days (R. 6).

Metromedia responded on May 1, 1969, stating that the commentary concerned the merit of a Los Angeles Times story (R. 7). Further, there was no personal attack involved in the commentary, as was evident by complainant's use of the word "implication" to support its assertions. The response also pointed out that Mrs. Healey had not been called a liar, nor was she accused of participating in or supporting any type of activity which the complaint characterized as constituting a crime (R. 8). Nor could the newscaster's statements that certain invidious practices did not occur in the United States be construed as a personal attack on Mrs. Healey.

As further grounds for denial of the complaint, Metromedia also pointed out that even if the commentary could be construed as a personal attack, it was exempt from the Commission's personal attack rules, since this commentary occurred during a news broadcast. And, assuming there was an attack, it did not occur during the discussion of a controversial issue of public importance (R. 9).

By letter dated June 24, 1970 (released July 27), the Commission denied Mrs. Healey's complaint (R. 21-23). The opinion noted that

roughly half[6/] of Mr. Putnam's commentary consisted of the recitation of quotations from the Times article that were highly favorable to Mrs. Healey; and that Putnam disagreed with the Times insofar as it used the term "patriot" in describing Mrs. Healey.

The Commission held that the personal attack rules were inapplicable, since they exempt commentary which is a part of a bona fide newscast (R. 22). Consequently, the case turned on the applicability of the fairness doctrine. And in applying the standards underlying this doctrine, the Commission held that the licensee's judgment, that the role played by Mrs. Healey was not a matter of public importance in the area, was clearly not unreasonable. One of the considerations taken into account was the lack of any showing by complainant that this matter consistuted a controversial issue of public importance (R. 23).

Mrs. Healey made no demand for a retraction of the commentary in question, nor did she seek damages in a civil action for defamation.[7/]

This appeal followed release of the Commission's opinion denying her complaint against Metromedia.

6/ Nine out of 19 paragraphs in the commentary were devoted to a recitation of Mrs. Healey's views as expressed in the Times article (R. 22).

7/ Cf., Cal. Civ. Code §48a(Deering 1960). Petitioner below analogized the personal attack doctrine to the law of libel. Despite this analogy, it is significant that Petitioner did not seek civil damages nor even a retraction from Metromedia.

SUMMARY OF ARGUMENT

Petitioner is really asking this Court for a hearing ab initio on a complaint determined adversely to it. Petitioner is seeking to have this Court abandon its appropriate role in a review proceeding. All the Court may do is determine whether there exists a rational basis for the agency's action. If it so finds, its role is at an end.

The commentary in question did not involve a personal attack within the meaning of the Commission's rules. The commentary was critical of the news judgment of another media, and the mere fact that Petitioner was mentioned during the course of the commentary (without vilifying her in any manner) does not amount to a personal attack. In short, the record amply supports the broadcaster's determination that no personal attack was involved here and there was a rational basis for the Commission's conclusion on this score.

The Commission was similarly correct in holding that Metromedia had acted reasonably in determining that Putnam's commentary did not involve a controversial issue of public importance in the area. Petitioner argued below that the controversial issue involved was the role played by Communists in our society. Petitioner has changed its ground here and advances an argument not urged below. In deference to the Commission and Intervenor, the Court cannot consider Petitioner's new ground. It is highly significant that Petitioner submitted no data to support its argument that the commentary concerned a controversial issue of public importance.

Even if there had been a personal attack, it occurred in a commentary that was a part of a bona fide newscast and was thus exempt from the personal attack rule. Realizing the weakness of its case, Petitioner now contends that Putnam's commentary was not really commentary at all; it was really an editorial. Petitioner did not advance this argument below and it cannot be considered here.

The argument is addressed to the wrong forum for still another reason. In order to adopt Petitioner's argument, this Court would have to revise a rule that has been approved by the Supreme Court. Any revision of the rule must originate with the Commission following appropriate rulemaking proceedings.

Finally, Petitioner argues that some independent rights accrue to her by reason of the delay in ruling upon her complaint. Metromedia was not responsible for the delay and it cannot be penalized for it. Petitioner has no independent rights vis-a-vis Metromedia arising out of the proceeding below.

ARGUMENT

I. Petitioner Seeks A Reversal Of Traditional Roles And A Hearing Ab Initio On Its Complaint.

Petitioner is really asking this Court to abandon its traditional role and grant it a hearing ab initio on questions determined adversely to it below. The type of searching examination that Petitioner would

require of this Court would involve it in the day-to-day examination of the broadcaster's journalistic function. Such "pervasive supervision"[8/] has not been granted to the Commission, let alone to this Court. Were the Commission to do more than appraise the reasonableness of a licensee's actions, it would be treading on territory forbidden it by the First Amendment and Section 326 of the Communications Act.[9/] The Court can do no more. In fact, its scope of review is limited and if there is a rational basis for the Commission's action, the Court's duty is at an end. Philadelphia Television Broadcasting Co. v. F.C.C., 123 U.S. App. D.C. 298, 359 F.2d 282 (1966); McCarthy v. F.C.C., 129 U.S. App. D.C. 56, 390 F.2d 471 (1968). When tested by these principles, Petitioner's attack must fail.

A. The Record Adequately Supports The Determination That No Personal Attack Was Involved Here.

"...[N]o matter how strong the disagreement as to views may be, the personal attack principle is not applicable"[10/] unless there has been an attack on an individual's honesty, character, integrity or like personal qualities. In adopting the personal attack rules, the Commission noted

8/ Banzhaf v. F.C.C., 132 U.S. App. D.C. at 27, 405 F.2d at 1095, cert. denied, 396 U.S. 842 (1968).

9/ 47 U.S.C. §326.

10/ Personal Attacks, 8 F.C.C. 2d 721, 724 (1967).

that close questions are bound to arise concerning the applicability of the rules and that licensees would have to make good faith judgments as to their applicability in a particular situation.[11/]

A personal attack is something quite different from "mere mention, comment or even vigorous criticism". The rule is intended to cover "personal vilification in the context of the discussion of public issues".[12/] See John H. Norris, 1 F.C.C. 2d 541, (1965); see also Pennsylvania Community Antenna Association, 1 F.C.C. 2d 1610a (1965). There was no personal vilification involved in Putnam's commentary.

There is no question but that Putnam's commentary was critical of the Times' news judgment in devoting so much space to Petitioner when it failed to devote an equal amount of space to current news items, such as the Vietnam War and the Mid-East crisis. Nor do we think it can be seriously questioned that in the development of his argument the commentator could ignore what the article was all about. He quoted laudatory portions of the article; he criticized those portions with which he disagreed. By no stretch of the imagination could any of the references to Mrs. Healey be considered personal vilification. Putnam did not call her a liar. He did not accuse her of engaging in criminal activity, and the mere fact that he disagreed with the Times' characterization of her

11/ Id. at 724-5.

12/ See the government's brief in Red Lion Broadcasting Co. v. U.S. in the Supreme Court at pp. 72-73.

as a "patriot" does not constitute personal vilification. If personal vilification had been present, the complaint below most assuredly would not have been cast in terms of "implications" from what was said (R. 7, 18). If vilification had been involved, most assuredly civil redress would have been sought (see n. 7 supra).

In its attempt to write the commentary exemption (discussed infra) out of the rule, Petitioner acknowledges that Putnam was attacking the feature in the Times (see Pet. Br. 18). At the same time, Petitioner contends that Putnam's opinions actually amounted to an editorial and, therefore, the broadcast does not come within the exemption to the personal attack rule.

This argument ignores the underlying thesis of the commentary; i. e., the newscaster was critical of the exercise of the news judgment of the Times, not only because of the placement of the story but also because of the devotion of so much space to this type of article. In this connection, it should be noted that it is not at all uncommon for one journalist to question another's news judgment relative to a particular story. And the fact that a newsman comments on what he considers to have been an error in news judgment on the part of another does not change that commentary into an editorial presentation.

When fairly analyzed, what Petitioner is really asking here is for a hearing before this Court ab initio on its complaint. What Petitioner is asking is for this Court to abandon its traditional role and to substitute the Court's judgment not only for the Commission but also for the broadcaster.

The interpretation and application of the fairness doctrine and its related rules are matters entrusted to the sound discretion of the Commission. Cf., Udall v. Tallman, 383 U.S. 1, 16 (1965). Further, the Commission has stated that the selection and presentation of program material is the responsibility of the licensee. "The Commission's role as a practical matter, let alone a legal matter, can not be one of program dictation or program supervision." Programming Policy, 20 Pike & Fischer R.R. 1901, 1908 (1960). Moreover, the Commission has recognized that licensees must have broad freedom in the exercise of their journalistic judgment. Hunger In America, 20 F.C.C. 2d 143, 150-1 (1969). In the exercise of its regulatory function, the Commission will not substitute its judgment for that of the broadcaster if the latter acts reasonably and in good faith. Report on Editorializing, 13 F.C.C. 1246 (1949).

Petitioner would have this Court do what the Commission will not do. Petitioner would have this Court engage in a day-to-day supervision of a broadcaster's journalistic judgment, a role eschewed by the Commission very simply because such a role entails the type of governmental censorship disavowed in Red Lion Broadcasting Co. v. U.S., 395 U.S. 367 (1969).

B. The Commission Was Correct In Holding That The Licensee Had Acted Reasonably In Determining That No Public Controversy Was Involved.

Even assuming there was a personal attack involved here, no obligation devolved upon KTTV to provide Mrs. Healey time unless the attack occurred during the discussion of a controversial issue of public importance. Under the fairness doctrine, the broadcaster is obligated in the first instance to determine whether one side of a controversial issue has been broadcast. And in evaluating that determination, the Commission will not substitute its judgment, if the licensee acts reasonably and in good faith. David Tillson, 19 F.C.C. 2d 511 (1969); and Mrs. Madalyn Murray, 5 Pike & Fischer R.R. 2d 263 (1965). The "Commission walks a tightrope between saying too much and saying too little". Banzhaf v. F.C.C., 132 U.S. App. D.C. at 27, 405 F.2d at 1095 (1968), cert. denied, 396 U.S. 842.

Petitioner now says that the controversial issue involved in Putnam's commentary is "guilt by association" (Pet. Br. 9). Suffice it to say that this is an argument that was not urged below and it can not be considered here. Unemployment Comp. Comm'n. v. Aragon, 329 U.S. 143, 155 (1946). Below it was argued that the controversial issue was the role played by Communists in our society (R. 18).

As the Times article submitted to the Commission clearly indicated, Communist Party membership in Southern California was declining rapidly. It had declined from a high of 5,000 in 1949 to 1,000 at the time the

article was published. This is an insignificant percentile of the total state population of 19,696,840,[13/] more than half of which live in Southern California. Furthermore, the Communist Party is not recognized as a "qualified" party pursuant to California Election Law,[14/] simply because the party did not receive a sufficient number of votes in the preceding general election to qualify for a place on the ballot.

The real thrust of Putnam's commentary was that the subject matter of the Times article was boring and unimportant. He questioned the Times' news judgment in devoting so much space to an item of such insignificance.

Under these circumstances, it is crystal clear that the licensee's judgment was eminently sound. There was no controversial issue of public importance involved.

Petitioner (Br. pp. 14-15) makes the bootstrap argument that the mere fact that an article was published about Mrs. Healey sprouted a controversial issue of public importance. This argument is specious. There are many feature items published each day that do not involve controversial issues. One has but to scan the features in The Washington Post and The Evening Star to discern this. Not infrequently, the papers carry a feature story on some person (a so-called "puff" piece) that raises no controversial issue of public importance.

13/ Preliminary 1970 figure, released by the Bureau of the Census.

14/ Included in the Appendix is a certificate of the Secretary of State of California, certifying to this fact.

Petitioner makes a similar unavailing argument based upon the fact that KTTV devoted time to the commentary. Petitioner attempts to buttress its argument with a statement of the alleged value of this air time (there is no record evidence on the value of the time).

First, much air time is devoted to subjects for which no charge is made. Second, if Petitioner's argument is taken to its logical conclusion, the total newscast would raise controversial issues of public importance for every minute it was on the air. The expenditure of broadcast time alone would evoke fairness obligations. When Petitioner's argument is viewed in this light, its fallaciousness is readily apparent.

At any rate, not only are these arguments specious, they are unavailing because they were not raised below. W. H. Hansen v. F.C.C., 134 U.S. App. D.C. 100, 102, 413 F.2d 374, 376 (1969). It must be remembered that complainant submitted no extrinsic evidence that the role played by communists in our society was a controversial issue of public importance in the area. Cf., Hale & Wharton v. F.C.C., 425 F.2d 556 (1970).

Assuming arguendo that this was an issue of public importance in the community, obligations different from those under the personal attack rule would be incurred. The licensee would be permitted to demonstrate that he had devoted a reasonable amount of time to the subject. Had he not covered the subject, he need not necessarily grant time to Mrs. Healey as spokesman for the communist viewpoint. Another spokesman might very well be more appropriate under the circumstances.[15/]

15/ See n. 4, supra.

But that is not the case presented to this Court. Here, the licensee determined that there was no controversial issue of public importance involved.[16/] There were ample grounds to support this judgment. Nothing advanced below (or here, for that matter) demonstrates that the licensee's judgment was unreasonable.[17/]

It is submitted that there was a rational basis for the Commission's holding that there was no personal attack involved in Putnam's commentary. Once having found that such a rational basis existed, the Court's review function is at an end. But, even if the Court should decide to the contrary, there is still no ground for reversal inasmuch as a personal attack in a news commentary is specifically exempt from the requirements of §73.679(a) of the Commission's Rules.

II. Petitioner Seeks To Have This Court Revise The Personal Attack Rule.

In its complaint below, Petitioner contended that the commentary broadcast by KTTV involved a personal attack on Mrs. Healey within the meaning of Section 73.679 of the Commission's Rules (47 C.F.R.

16/ The licensee is expected to have his finger on the pulse of the community he serves and to know the needs and interests of that community for broadcast service. Cf., Henry v. United States, 112 U.S. App. D.C. 257, 302 F.2d 191, cert. denied, 371 U.S. 821 (1962).

17/ At pp. 15-16 of its brief, Petitioner recites controversies concerning the treatment accorded various groups at other times in our history. Petitioner's arguments on this score are wholly irrelevant. We are here concerned only with whether Putnam's commentary involved a discussion of a controversial issue within the Los Angeles area.

§73.679). Obviously realizing the weakness of its position before this Court, Petitioner has broadened its complaint. Petitioner now appears to argue, without any foundation in fact, that Putnam's commentary was an editorial[18/] (Pet. Br. 7), in an obvious effort to avoid the consequences of the exemptions contained in the personal attack rule. This argument offends the well-known doctrine, which has been codified in Section 405 of the Act (47 U.S.C. §405), that this Court is precluded from entertaining arguments which the agency has not been given an opportunity to pass upon. Albertson v. F.C.C., 100 U.S. App. D.C. 103, 105, 243 F.2d 209, 211 (1957). If this argument is to be considered by the Court in the first instance, it is still not availing.

What Petitioner would have this Court do is to read out of the personal attack rule the exemption for commentary contained in §73.679(b)(iii). The obvious effect of such a tactic (if successful) would be to modify the rule without the benefit of rulemaking.

Following adoption of the personal attack rule, it has been amended twice. On August 7, 1967, the Commission issued a supplementary Memorandum Opinion and Order,[19/] exempting bona fide newscasts and on-the-spot coverage of news events from the working of the rule. Thereafter, the Commission further amended the rule to exempt bona fide news interviews and commentary and analysis occurring during the course of

18/ But see p. 12 of Petitioner's Brief, where it is referred to as commentary.

19/ 32 Fed. Reg. 11531.

bona fide newscasts.[20] This was done in order to avoid any possible inhibition of broadcast journalism. The reasons for these exemptions were articulated in the concurring opinion of Commissioner Cox in the following terms:[21]

> "The Commission is here exempting all commentary or analysis in newscasts or other exempt programs, since such commentary or analysis is an integral part of the news function; it can, for example, occur at any point in a newscast and, indeed, the trend is more and more toward such 'in depth' presentation of the news. What is not exempt is the labelled editorial of the licensee. To put it in terms of the situation of CBS, as Commissioner Loevinger does, the commentary and analysis of Walter Cronkheit and Eric Sevareid in newscasts are exempt, but the presentation by a network official, or by an announcer, of the editorial opinion of CBS is not. No real problem of differentiation is presented, and the reasons for the different treatment are set out in the majority opinion. I think that there is a great difference, in terms of the policy considerations with which we are dealing, between presentation of the news, in all its forms, and the labelled editorial opinions of the licensee. Finally, our revision does not turn on Eric Sevareid or any other particular person, though it is useful to discuss the issue in such personalized terms. Rather, our changes in the rule are based on the same considerations that moved Congress to amend Section 315 of the Act in 1959, and our action extends to all these news programs without regard to the individuals who may be involved in presenting them."

The Commission recognized the "high risks"[22] involved in the sensitive areas, where the personal attack rules may come into play. "[W]ith First Amendment issues lurking in the background, the 'public interest' is too vague a criterion for administrative action unless it is

20/ 33 Fed. Reg. 5362.
21/ Fairness Doctrine Rules, 12 RR 2d at 1920 (1968).
22/ Banzhaf v. F.C.C., 132 U.S. App. D.C. at 28, 405 F.2d at 1096, cert. denied, 396 U.S. 842 (1968).

narrowed by definable standards [footnote omitted.][23/] Here, the Commission has been scrupulous in defining standards. It has adopted a rule, which exempts commentary aired in a bona fide newscast from the personal attack rules. And these rules have been specifically affirmed by the Supreme Court. Red Lion Broadcasting Co. v. U.S., 395 U.S. 367 (1969).

In urging its "editorial matter" argument (Pet. Br. 17-20), Petitioner is seeking to have this Court re-write the Commission's Rules in a manner that suits its purpose.[24/] Suffice it to say that Petitioner is in the wrong forum. Any attack on the validity of the rule comes far too late. Any change in the rule can only be made by the Commission following an appropriate rulemaking proceeding under Section 303(r) of the Communications Act (47 U.S.C. §303(r)). Petitioner's argument is more appropriately addressed to the Commission -- not this Court.

III. Metromedia Can Not Be Penalized For Delay in Agency Action.

In Part III of its brief, Petitioner appears to argue that the delay in Commission action on the complaint gives rise to independent rights to Petitioner. Metromedia will not undertake to defend the Commission on

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23/ Ibid.

24/ Petitioner cites no authority for its proposition that Putnam's commentary was editorial matter. Moreover, Petitioner concedes (Pet. Br. 17) that Putnam's commentary was not a station editorial. This concession is extremely significant and it irreparably damages Petitioner's case, when it is viewed in the light of Commissioner Cox's concurring opinion, a portion of which is quoted above.

the charge that the agency's delay in resolving the complaint was unreasonable other than to point out that the Commission is faced with a number of extremely difficult and far-reaching problems that will affect the future of the total communications structure of this nation. Further, it processes thousands of applications each year and engages in multitudinous other activities.

Be that as it may, Metromedia was not responsible for the delay[25/] and the consequences of that delay are not attributable to it. There is no warrant in law for penalizing Metromedia, when it was right in its assessment of the complaint, simply by virtue of the fact that the regulatory agency did not resolve the matter within a time that would have satisfied Petitioner.

* * * *

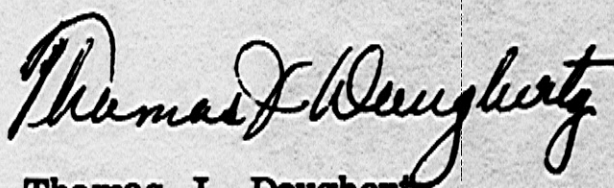
In Part IIB of its brief, Petitioner cites certain so-called political and civil rights cases to support its argument. These cases are not applicable and, as a consequence, we have not addressed ourselves to them.

25/ It should be noted that Petitioner waited more than a month before filing its complaint with the Commission. Metromedia was required to respond in ten days; it responded in eight. Twenty-six days thereafter, Petitioner submitted its reply to Metromedia's answer.

CONCLUSION

The order of the Commission on review is valid in all respect. It should be affirmed.

Respectfully submitted,



Thomas J. Dougherty
5151 Wisconsin Ave., N.W.
Washington, D. C. 20016

Counsel for Metromedia, Inc.

February 1, 1971.

APPENDIX

STATUTES AND RULES INVOLVED

COMMUNICATIONS ACT OF 1934,
As Amended

Sec. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall --

* * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

Sec. 326. Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

Sec. 405. After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 5(d)(1), any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for rehearing only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 5(d)(1), in its discretion, to grant such a rehearing if sufficient reason therefor be made to appear. A petition for rehearing must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse

(Sec. 405 con'td.)

any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for rehearing shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for rehearing or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: Provided, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Rehearings shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any rehearing. The time within which a petition for review must be filed in a proceeding to which section 402(a) applies, or within which an appeal must be taken under section 402(b) in any case, shall be computed from the date upon which public notice is given of orders disposing of all petitions for rehearing filed with the Commission in such proceeding or case, but any order, decision, report, or action made or taken after such rehearing reversing, changing, or modifying the original order shall be subject to the same provisions with respect to rehearing as an original order.

RULES AND REGULATIONS OF THE FEDERAL COMMUNICATIONS COMMISSION

§73.679 Personal attacks; political editorials. - (a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

(b) The provisions of paragraph (a) of this section shall not be applicable (i) to attacks on foreign groups or foreign public figures; (ii) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (iii) to bona fide newscasts, bona fide news interviews, and on on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of paragraph (a) shall be applicable to editorials of the licensee).

P. Sullivan
[redacted]
TARY OF STATE

TELEPHONE: (916)
MAIN OFFICE 445-6371
CORPORATION INDEX 445-2900
CORPORATION RECORDS 445-1768
CERTIFICATION 445-1430
STATE ARCHIVES 445-4293
UNIFORM COMMERCIAL CODE 445-9061

OFFICE OF THE

Secretary of State

STATE OF CALIFORNIA
SACRAMENTO 95814

December 30, 1970

TO WHOM IT MAY CONCERN:

I hereby certify that the Communist Party is not recognized as a "qualified" party pursuant to California Election laws.

H. P. SULLIVAN
Secretary of State

HPS:pv

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,630

DOROTHY HEALEY,

Petitioner,

vs.

FEDERAL COMMUNICATIONS COMMISSION,
and the UNITED STATES,

Respondents.

BRIEF FOR PETITIONER

MELVIN L. WULF
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Foundation
156 Fifth Avenue
New York, N. Y. 10010

Attorney for Petitioner

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UNITED STATES COURT OF APPEALS
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vs.	)
	)
FEDERAL COMMUNICATIONS COMMISSION, and the UNITED STATES,	)
	)
Respondents.	)

BRIEF FOR PETITIONER

Questions Presented

1. Did the licensee of television broadcasting frequencies incur an obligation to present contrasting viewpoints when it permitted a newscaster the use of its facilities to deliver approximately six minutes of vituperative comment, impugning petitioner's character, made about a newspaper article featuring the petitioner, which dwelt upon her conventional virtues and the harassments she had experienced because of her acknowledged membership and official position in the Communist Party?

   a. Did such an obligation arise under the Federal Communications Commission's Fairness Doctrine, long and frequently enunciated and applied by the Commission, which the Commission arbitrarily and discriminatorily failed and refused to apply on the petitioner's complaint in this instance?

   b. Did such an obligation arise under the First Amendment, out of the licensee's legal monopoly over the television frequency assigned to it?

2. If the licensee did incur such an obligation, is the petitioner the appropriate person to present the contrasting viewpoint, so that the licensee's obligation requires it to permit her the use of its facilities to respond?

3. Does the denial of justice occasioned by the Commission's unaccountable delay in ruling on this complaint require the provision of extraordinary relief?

The pending case has not previously been before this court under the same or any other title.

Reference to Rulings

The basis of the order presented for review is set forth in the letter of the Federal Communications Commission to the petitioner dated June 24, 1970, released July 31, 1970 (Ruling below), 19 R.R. 2d 761, appearing at page 21 of the appendix.

Regulation Involved

47 C.F.R., §73.679, The Personal Attack Rule, is set out in the appendix, infra.

Statement of the Case

Petitioner, Dorothy Healey, is Chairman of the Communist Party in Southern California, in whose affairs she has been active for some forty years. Her Communist identification is widely known and has been the occasion of both official action and attention through the mass media.

On Sunday, February 16, 1969, the Los Angeles Times featured a profile of the petitioner entitled, "Patriot-Marxist--L. A.'s Number One Red Finds the U.S. Isn't All Bad." Reciting that petitioner is "a Marxist, a Communist and an atheist," the profile stated that "Dorothy Healey might be considered an exemplary American and a good member of the bourgeoisie ... she owns her home, pays her taxes, cares for her aged mother, dotes on her scholarly son, and generally likes folks, young and old. She professes a sincere patriotism, and for years, while her son was in school, she rarely missed a meeting of the P.T.A."

Describing Mrs. Healey's early commitment to Communism, the profile related the arrests and prosecutions that arose from her Communist identification. The devastating effect of these on her young son were developed. So, too, were her views on the bugging of her home and office and their consequences

upon the lives of persons who had any association with her.

The next day George Putnam devoted approximately six minutes of the licensee's 4:30 and 10:00 P.M."News Reports" to an expression of his "rage" at the Los Angeles Times' story. Putnam quoted several portions of the Times' profile, and paraphrased its description of her career. Then, inter alia, referring to the Times' statement that Dorothy Healey "sobbed all night long" on hearing Krushchev's report concerning the horrors committed by Joseph Stalin, Putnam asked, "One can't help but wonder if she might have lost another night's sleep had Krushchev told us of his own extermination of millions of Ukranians by systematic starvation. Wonder if she ever heard about that?" Again, referring to the Times' telling of her home and office being bugged, Putnam remarked, "Actually, Mrs. Healey should be right at home with such tactics -- because they're all too commonplace among the Communists."

Quoting the Times' statement that often parents of youths who have visited her are threatened with the loss of their jobs, Putnam said, "Come, come, now Dorothy -- perhaps under Communism -- perhaps under the Nazis -- but it just doesn't happen in the United States of America." "Dorothy

Healey may be the Los Angeles Times' kind of exemplary American ...," Putnam concluded, "but she sure as hell is not mine. And, my fellow Americans, I trust she is not yours. And if you are as shocked as I am by this insult to American patriotism, I urge you to let the Times hear your voice -- loud and clear."

The petitioner made a demand upon the licensee for time to reply, and this demand was rejected in a letter dated March 11, 1969. On March 26, the petitioner complained of this denial to the respondent, Federal Communications Commission, which, a year and a quarter later, on June 24, 1970 (released July 31, 1970), denied her complaint. The Commission ruled that the "combined force of [two] considerations (i.e., the showing (or lack thereof) before us on controversial issues of public importance; the devotion of significant time to setting forth [petitioner's] views, indeed to an unusual extent in this kind of critical commentary) leads us to conclude that no further action is warranted." FCC letter of June 24, 1970, to petitioner (Ruling below), p. 3.

This petition seeks a review of that ruling.

Summary of Argument

Although the television licensee in this case denies that the Putnam statement constituted a personal attack, the Commission's ruling for the licensee does not seem to take that denial seriously. The plain thrust of the editorial was that the petitioner, because she is a Communist, could not be deemed to possess character or other conventional virtues and that the Times' suggestion that she did constituted an insult to other Americans. Clearly, the statement did constitute a personal attack.

Nor does its placement within a newscast exempt it from the Commission's personal attack rules, for the relevant exemption applies only to "bona fide" newscasts. 47 C.F.R. §73.679(b)(iii). Neither the licensee's label for the program nor its placement in the broadcast day can change its substance. It was a piece of advocacy - an editorial, not news, news commentary, or news analysis.

The application of the Fairness Doctrine, with which the licensee must comply whether or not the statement is exempt from the personal attack rules, is the crux of the case. Under that Doctrine, as the Communission has enunciated it and previously applied it, the licensee incurred an obligation to

present contrasting views if the material in question amounted to one side of a controversial issue of public importance.

It is not claimed that the licensee presented any contrasting views, except that Mr. Putnam in the broadcast quoted parts of the Los Angeles Times' article and paraphrased at some length its description of petitioner's life history. The majority below discounted that claim with the apt comment that, "we do not believe that fiarness can be achieved by relying on the person making the criticism or attack to present the other side." Letter to petitioner, June 24, 1970, p. 3.

The Commission majority's misconception of what was the issue being presented, provides the only real dispute as to the Doctrine's applicability. The majority's letter refers to "the public significance of your role as a Communist," as though no more than the petitioner's own character and activities were involved. (Even were that so, the extensive February 16 treatment of it by the area's leading newspaper and this licensee's devotion of six minutes to it, once repeated, would seem enough to establish both that the issue was controversial and that it was of public importance in the licensee's area.)

But, actually, the issue presented by this attack on Mrs. Healey's character solely for her Communist beliefs and political activity is that of guilt by association. It is that issue that turned the political climate of our country inside out at various times in its history, most notably during the first half of the 1950's, and threatens to do so again. It is a fundamental challenge to all of the values embodied in the American traditions of individual liberty and justice. It has engaged the attention of as large a number of Americans as any issue short of human and national survival. It is one of the great issues of all time.

Although the Commission at no point relied upon the cases cited by the licensee for its proposition that Fairness Doctrine obligations do not inure to the benefit of Communists, it is necessary nevertheless to deal with that suggestion by the licensee. Were the Commission to have so held, its ruling would have violated constitutional standards imposed upon it by both the First and Fifth Amendments.

Independently of the Fairness Doctrine, the circumstance of lawful monopoly of the frequency assigned to this licensee would create a First Amendment obligation in the licensee to make its facilities available for the presentation

of contrasting viewpoints to those expressed in the Putnam attack. The implications of the First Amendment here parallel the principles of the Fairness Doctrine because of the monopoly assigned to the licensee in the control of expression over this powerful medium.

The Fairness Doctrine and, we believe, constitutional obligation imposed on the licensee to present contrasting views can be satisfied in this instance only by making the licensee's facilities available to petitioner to respond. Though, as we have said, the issue is larger than the petitioner, the licensee chose to make her character itself a significant part of that issue. Only her viewpoint adequately represents the other side of that part, whatever the licensee's additional obligations or choices may be with respect to the larger issue.

The year and one quarter during which the Commission delayed ruling on petitioner's complaint creates an especial problem under the First Amendment. No circumstance is cited to explain this delay; no requirement inherent in doing justice between the petitioner and the licensee necessitates it. Administrative indecision in this circumstance conspicuously denied the petitioner justice by delaying it; not even an appealable order became available to her to vindicate her reputation for nearly eighteen months after Mr. Putnam's attack

upon her. As with the adjudication of most issues involving speech and the press, particularly those involving political expression, time is of the essence in the protection of First Amendment rights. Because Mrs. Healey's rights are grounded in the First Amendment as well as in the regulatory doctrine of an administrative agency, we believe that she should not have been confined to an administrative remedy. We respectfully urge the court to express its view that a repetition of such delay in another case would warrant the pursuit of a judicial remedy while the administrative one was pending.

Argument

I

THE LICENSEE HAS AN OBLIGATION TO PRESENT VIEWS CONTRASTING WITH THOSE EXPRESSED IN MR. PUTNAM'S COMMENTARY.

A. The Commission's Own Fairness Doctrine, Non-discriminatorily Applied, Imposes Such An Obligation.

1. The Putnam commentary constituted a personal attack upon the petitioner. In 1967 the Commission codified that portion of its standards for broadcast licensee fairness that dealt with personal attacks (and political editorials). 47 C.F.R. §73.679. For present purposes, the operative

statement of the personal attack principle appears in these words:

> (a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall...transmit to the person or group attacked...an offer of a reasonable opportunity to respond over the licensee's facilities. Id. §73.679(a).

That the Putnam commentary clearly fell within the language of that rule which describes "an attack...made upon the honesty, character, integrity or like personal qualities of an identified person" is best stated by one sentence from Commissioner Johnson's dissenting opinion which described the Putnam commentary as follows:

> Thus, Mr. Putnam indicates that Mrs. Healey is a member of the Communist Party, and because of that: (1) she is a liar [who makes "unsubstantiated charges"]; (2) she is guilty of hypocrisy and deceit [e.g., attending P.T.A. meetings under the guise of concern for her son]; (3) she is callous and cruel [failing to lose sleep over Khrushchev's "extermination of millions"]; (4) she is implicated in illegal conduct [bugging, wire tapping, etc.]; and, (5) she is generally not a "patriot." (Emphasis in original.) Ruling below, Dissenting opinion of Commissioner Johnson, at p. 4; App. 36.

A consummate skill in dissembling is necessary to pretend that

such accusations do not constitute an attack upon Mrs. Healey's integrity. The suggestion, made in the licensee's response to the Commission's inquiry, that the attribution of qualities of deception, hypocrisy, callousness and complicity in crime such as wiretapping, has to be found in implications (letter to William B. Ray, May 1, 1969, at pp. 2-3), proposes to convert the whole meaning of the Fairness Doctrine into a game of innuendo. Principles lose their meaning if the consequences of the personal attack rules would flow from a charge that Mrs. Healey participates in the bugging of homes and offices but not from Mr. Putnam's remark: "Actually, Mrs. Healey should be right at home with such tactics [the bugging of her home and her office] -- because they're all too commonplace among the Communists."

2. <u>The attack was made "during the presentation of views on a controversial issue of public importance</u>." The Commission majority appears to have decided against the petitioner on this issue, not by stating either its own conclusions or its reasons, but by stating the licensee's contentions:

> First, we note the licensee's judgment that the matter which you claim to be a controversial issue of public importance -- the role played by you as a Communist -- is not an issue of public importance in this area. Ruling below, p. 2.

The majority's only other reference to this issue appears in the following two sentences which seem to constitute its disposition of the complaint:

> We believe that we can take the above noted factor [that the Putnam commentary devoted substantial time to quotation and paraphrase from the Los Angeles Times' article] into account in evaluating the need for action in this case, and specifically, whether we should find unreasonable the licensee's judgment as to the public significance of your role as a Communist, in circumstances where your views have been put before the public to a significant extent. The combined force of these considerations (i.e., the showing (or lack thereof) before us on controversial issues of public importance; the devotion of significant time to setting forth your views, indeed to an unusual extent in this kind of critical commentary) leads us to conclude that no further action is warranted. Id. p.3.

The Commission appears to have held that no controversial issue of public importance was shown to have been presented, finding that the issue in question was "the role played by [the petitioner] as a Communist."

But such a conclusion would be negated by the attention which the licensee itself paid to the issue, and by that which it noted the area's principal metropolitan daily had given it, if not otherwise. Mr. Putnam spoke of the

Los Angeles Times' feature devoted to Mrs. Healey in terms of the "rage" that it evoked or he felt it should evoke. He was given six minutes of the licensee's scarce news time, at 4:30 P.M., to comment on that issue. And his comments were repeated in the scarce, prime-time, news slot at 10:00 P.M. the same evening. At commercial rates these twelve minutes amounted to thousands of dollars of valuable air time devoted to an issue which the licensee claims not to have been of public importance in its area.

The licensee treated the issue as one of importance, and in fact it was. That could be because of the inherent importance of Mrs. Healey as a personality in the Los Angeles area, an importance underscored by the space devoted to her in the preceding day's Los Angeles Times. But whether such importance inhered in Mrs. Healey's public personality or not, the issue itself was of major importance, for the Putnam statement did not deal with what Mrs. Healey had thought or said or written or done, save in one respect: It spoke of what she had thought and done by associating herself, publicly and permanently, with the Communist Party, with Marxist ideology, and with atheism.

The statement concluded that Mrs. Healey's character was despicable because of her association with Maxism, Communism,

and atheism. It's low assessment of her was not based upon individual acts of terror (or condonation of terror) of hypocrisy and deceit, of lying and underhanded intrusion into the lives of others, or of hostility and disloyalty to her own land and its people. Rather it concluded that <u>because of her professed beliefs and her associations</u>, the qualities of dishonesty, hypocrisy, deceitfulness, callousness, underhandedness and disloyalty <u>must</u> inhere in her personality.

This is the practice of the norm of guilt by association. It has racked Americans from the days of the Salem witch trials. It is rejected by the norms embodied in the first ten amendments to the Federal Constitution. But those norms, of individual judgment and individual justice,have remained controversial even since 1791.

As recently as 1942 our nation herded thousands of American citizens into evacuation centers because of their presumed disloyalty as descendants of Japanese ancestors, and controversy over the propriety of that action persists to this day. Controversy over the very propositions that Mr. Putnam advanced were the dominant issues in public debate in the first half of the decade of the 1950's. That controversy centers today over the manner of judging radicals of various persuasions --

Black Panthers, white adherents of the "new Left," members of the Ku Klux Klan, and others. It would be Pollyannish to assume that this issue will not be one of public importance a generation from now. It indisputably is one today.

3. The Putnam statement was not exempt from the personal attack rules. Despite being telecast in the time slot reserved for regular news, the Putnam commentary in question fails to fit the description of a newscast exempted from the Commission's personal attack rule. The exemptions appear in paragraph (b) of the regulation:

> (b) The provisions of paragraph (a) of this section shall not be applicable...(3) to bona fide newscasts...including commentary or analysis contained in the foregoing programs, but the provisions of paragraph (a) of this section shall be applicable to editorials of the licensee. 47 C.F.R. §73.679(b).

Since the views of Mr. Putnam have not been identified as those of the licensee, we do not claim that his statement was an "editorial of the licensee," within the meaning of the last clause above quoted. But, unless the licensee's own classifications of his programs are to be controlling, neither is it possible responsibly to claim that this material constituted a bona fide newscast (or "commentary or analysis contained in" a bona fide newscast).

> Under the American system of broadcasting it is clear that responsibility for the conduct of a broadcast station must rest initially with the broadcaster. It is equally clear that with the limitations in frequencies inherent in the nature of the radio, the public interest can never be served by a dedication of any broadcast facilities to the support of his own partisan ends. Radio can serve as an instrument of democracy only when devoted to the communication of information and the exchange of ideas fairly and objectively presented. A truly free radio cannot be used to advocate the causes of the licensee. Mayflower Broadcasting Corp., supra, at 339-40.

Comparably, in 1949 when the Commission gave its blessing to editorializing while enunciating the Fairness Doctrine, it said:

> It would be inconsistent...to assert that, while it is the purpose of the [Federal Communications Act] to maintain the control of the United States over radio channels, but free from any regulation or condition which interferes with the right of free speech, nevertheless...[licensees]...may themselves make radio unavilable as a medium of free speech.... Report, Editorializing by Broadcast Licensees, supra, at 1248.

Clearly the Commission saw the essence of licensee editorializing, which in 1941 it appeared to prohibit and in 1949 to sanction (within the confines of the Fairness Doctrine), to be advocacy of "the causes of the licensee." It is as much within the evil to which the 1941 decision was addressed for the licensee to turn over his facilities to another for that

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But such a conclusion would be negated by the attention which the licensee itself paid to the issue, and by that which it noted the area's principal metropolitan daily had given it, if not otherwise. Mr. Putnam spoke of the

Los Angeles Times' feature devoted to Mrs. Healey in terms of the "rage" that it evoked or he felt it should evoke. He was given six minutes of the licensee's scarce news time, at 4:30 P.M., to comment on that issue. And his comments were repeated in the scarce, prime-time, news slot at 10:00 P.M. the same evening. At commercial rates these twelve minutes amounted to thousands of dollars of valuable air time devoted to an issue which the licensee claims not to have been of public importance in its area.

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Clearly the Commission saw the essence of licensee editorializing, which in 1941 it appeared to prohibit and in 1949 to sanction (within the confines of the Fairness Doctrine), to be advocacy of "the causes of the licensee." It is as much within the evil to which the 1941 decision was addressed for the licensee to turn over his facilities to another for that

individual's partisan advocacy, as it is for those facilities to "be used to advocate the causes of the licensee." It is as much within the Editorializing Report's concern that licensees may not "themselves make radio unavailable as a medium of free speech" for the licensee to confine its facilities to use by Mr. Putnam, for expression of views on this issue, as it would be to confine them to its own use for its own partisan advocacy. Thus, whether or not Mr. Putnam expressed the views of the licensee, his six minutes at 4:30 and 10:00 P.M. on February 17 were clearly six minutes of editorial matter, within the meaning of the Fairness Doctrine.

4. In any event, broadcast of the Putnam statement triggered unfulfilled Fairness Doctrine obligations. There is no suggestion in the exemption of "bona fide newscasts" from operation of the personal attack rules, that they are at the same time exempted from the Fairness Doctrine itself. In fact, in a note to paragraph (b) of Section 73.123 of the regulations, the Commission says:

> NOTE: The Fairness Doctrine is applicable to situations coming within (b)(3), above . . . 47 C.F.R. §73.679(b), note.

No doubt on this score is suggested in either the majority or the minority opinions within the Commission, nor even in the licensee's response to the petitioner's complaint. But for the licensee's claim that the Putnam remarks did not occur in the course of the presentation of views on a controversial issue of public importance, the majority opinion below asserts, Fairness Doctrine obligations would clearly have ensued.

However, there is a suggestion in the majority opinion below, that the devotion of "nine out of nineteen paragraphs" in the Putnam commentary to quotation and paraphrase of the Times' article went some distance toward satisfying that obligation. The majority opinion states that so much time spent on the Times' material was indeed "unusual. . . in this kind of critical commentary." App. 23. At the same time, however, the Commission notes that, "If this were the sole issue in the

case, we would not . . . accord it decisional significance." The majority explains why this is so when it says,". . . we do not believe that fairness can be achieved by relying on the person making the criticism or attack to present the other side. See Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, n. 18, quoting J. F. Mill, On Liberty, 32." Ibid.

The majority's minimization of the decisional significance of this factor is disarming. Actually, Mr. Putnam has made no pretense of being fair to views opposing those of his own. He has quoted a few lines from the Times' article, each to provide a target for his own attack on the Times and on Mrs. Healey. None of these quotations can be said to present fairly the views opposing Mr. Putnam's. For the rest of the "unusual" amount of time which he devotes to paraphrase of the Times' article, Putnam is merely setting forth the history of Mrs. Healey's Communist Party association as he drew it from that article, selecting those facts which he found most unfavorable. Both the quotations and the paraphrases were an integral part of the Putnam statement. And that was a statement of but one point of view--Mr.Putnam's own.

The purpose of the Fairness Doctrine is to insure that broadcasting serves the democratic interest in free speech, that it offers viewers and listeners access to a diversity of "social, political, asthetic, moral and other ideas and experiences." Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 390 (1969).

The licensee here, having offered its audience but one person's views and experiences, has taken the position that it will offer them no other. The purpose of the Fairness Doctrine takes on a special importance to the interests of broadcasting audiences in the special circumstances of a personal attack; the ideas and experiences of the object of the attack, himself, here possess unique characteristics as the "other side" of the controversy. The present licensee, having permitted an extensive use of its facilities for this attack upon Mrs. Healey, has made a determination to deny its viewers and listeners the advantages of hearing her response. To permit the licensee's refusal to stand, and the licensee itself to escape all further obligation for fair presentation on this issue, is to abandon altogether the notion that the license frequency must be used to serve democratic interests in free speech.

B. The Licensee's Fairness Obligation is Grounded in Constitutional As Well as Administrative Principles.

1. The discriminatory application of the Fairness Doctrine on the part of the Commission violates both the First and Fifth Amendments. Both of the dissenting opinions below find an implication in the majority's action that the petitioner's complaint was denied, arbitrarily, simply because of her political beliefs and associations. "Certainly [the majority's] letter does not clearly state a basis for the result in anything like the way we normally handle such matters. I think they have

arbitrarily departed from our usual policies simply because of the identity of the complainant. They do not like Communists and recoil from the prospect of ruling that a station should be required to provide time for one." Dissenting opinion of Commissioner Cox. App. 28. "A...disturbing aspect of this case," Commissioner Johnson wrote, "is its implication that the Commission will not apply the Fairness Doctrine even-handedly, but will deny its benefits to those groups the majority of commissioners find 'subversive'". Dissenting opinion of Commissioner Johnson. App.47.

Admittedly the majority does not state that this is the reason for their action. But, as each of the dissenters has pointed out, the majority really did not state a reason at all. Of their two asserted grounds for decision, they acknowledged that one would have lacked "decisional significance," standing alone, and that one bears no such relationship to the other as to warrant its apparent elevation as a result of the combination. With respect to the other (lack of "public importance" to the controversial issue being presented), the majority goes no further than to attribute it to the licensee as a claim. If the majority found that claim to be valid, it nowhere said so, nor assigned any reason for so finding it. The Commission conclusion having been reached without a fully stated rationale, it is not unreasonable to look to the Commission's total pattern of behavior for the real reason. It is particularly appropriate to do so where the Commission's conclusion is, as here, at odds with the policies

it has enunciated and with its previous application of the Fairness Doctrine.

The licensee supplies a clue to the real reason in its interpretation of a prior ruling by the Commission. In its response of May 1, 1969, it cited Tri-State Broadcasting Co., Inc., 40 FCC 508, (1962), for the proposition that, petitioner being admittedly "a member of the Communist Party...she is not entitled to time to reply." Letter of Metromedia, Inc. to William B. Ray, May 1, 1969. App. 8-9. In Tri-State the Commission held that the Fairness Doctrine applies to require the presentation of views contrasting with those contained in the broadcast of a one-half hour film entitled, "Communist Encirclement, 1961." The Commission found that there are varying views on "the most effective and proper way of combating Communism and Communist infiltration...", and that the prescription for combating Communism contained in that film presented one side of a controversial issue of public importance to which fairness required a response. However, in the course of its ruling the Commission said, "... it was not and is not the intention of the Commission that you make time available to Communists or the Communist viewpoint." 40 F.C.C. at 509. Seemingly, it was for the latter dictum that the licensee cited Tri-State.

The Commission's majority, in their letter to this petitioner, recites the licensee's reliance on Tri-State, and also attributes to it a reliance upon Storer Broadcasting Co., 11 FCC

2d 678 (1968) (although at no point in the licensee's only communication to the Commission in the record does the licensee cite Storer.) In Storer the Commission held that time should be made available to the DuBois Club for reply to an attack upon them for being Communist dominated. Commissioner Robert E. Lee dissented, stating: "The Fairness Doctrine ends at the international border and I would not take the responsibility of turning the microphone over to those who would advocate the overthrow of the government by other than the democratic process." 11 FCC 2nd at 681. In principle the majority's conclusion in Storer is not at odds with Commissioner Lee's position, for the issue as to which reply time is found necessary is simply whether the complainant is in fact a Communist. "...The licensee cannot aver that the attack is true and therefore there is no need to let the public hear the other side," the majority concluded. 11 FCC 2nd at 679.

If the Commission intended to adopt Commissioner Lee's position in Storer as its policy, or if its holding in the present case has the effect of doing so anyway, its actions violate the due process clause of the Fifth Amendment. Yick Wo v. Hopkins, 118 U.S. 356 (1886) (applying the identical clause of the Fourteenth Amendment to state action); Vitarelli v. Seaton, 359 U.S. 535 (1959).

More seriously, the arbitrary discrimination against a party because of her exercise of First Amendment rights of belief,

speech and association -- done in a ruling affecting the further exercise of her First Amendment rights* raises even more profound constitutional issues. It is precisely for the unpopular group and the hated opinion that constitutional limitations surround an administrative agency's powers to penalize or inhibit the exercise of political rights. See Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Once having adopted its fairness doctrine, the Commission may not deny its benefits to Mrs. Healey because of her beliefs, speech and associations. Speiser v. Randall, 357 U.S. 513 (1958); Sherbert v. Verner, 374 U.S. 398 (1963).

Moreover, it is indeed doubtful that the Commission would be free to abandon its Fairness Doctrine without some other provision for the free speech rights of those who have not been assigned broadcast frequencies. The Communications Act authorizes a series of monopolies in the control of such frequencies. The effect of granting a license to one broadcaster is to deny that frequency to all others. Since the number of frequencies available is far smaller than the number of those who may wish at any time to exercise free speech rights, the grant of such monopolies,

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* "...as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused." Red Lion Broadcasting Co. v. F.C.C., supra, 395 U.S. at 389.

standing alone, would be an unconstitutional denial of a forum for the exercise of First Amendment rights to all except licensees. Cf. Hague v. CIO, 307 U.S. 496 (1939); Wolin v. Port of New York Authority, 392 F.2d 83 (2d Cir. 1968). There may be many ways of satisfying the First Amendment claims to this forum for those who are not granted broadcast licenses, but the way the Commission has chosen to do so is the Fairness Doctrine. Its suspension or termination, without other provision for First Amendment rights, would transform freedom of speech with respect to broadcasting from a constitutionally guaranteed right into an unusual privilege permitted only to those enjoying the favor of an administrative agency. See Red Lion Broadcasting Co. v. F.C.C., supra, 395 U.S. at 390. Its suspension as to Mrs. Healey alone (or as to the members of her class) can stand on no firmer constitutional footing.

II

THE LICENSEE'S OBLIGATION IN THIS CASE IS TO PERMIT PETITIONER TO USE ITS FACILITIES TO RESPOND.

In its 1949 report on Editorializing by Broadcast Licensees, supra, the Commission noted the case of personal attacks as one involving special considerations under the Fairness Doctrine:

> . . . elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over

> the station, where otherwise no such obligation would exist. 13 F.C.C. at 1252.

In its application of the Fairness Doctrine to personal attacks the Commission has consistently adhered to this view, e.g., Clayton W. Mapoles, 40 F.C.C.497(1962); Radio Albany, Inc., 40 F.C.C. 632 (1965).**

Fundamentally, no effort made by the licensee to provide the listener with the viewpoint of the person attacked can be the equivalent of the response from that person himself.

> Nor is it enough that he [the listener] should hear the arguments of his adversaries from his own teachers, presented as they state them, and accompanied by what they offer as reputations. That is not the way to do justice to the arguments, or bring them into real contact with his own mind. He must be able to hear them from persons who actually believe them; who defend them in earnest, and do their very utmost for them. J.S. Mill, On Liberty, 32 (McCallum ed. 1947), quoted in Red Lion Broadcasting Co. v. F.C.C., supra, 395 U.S. at 392, n.18.

III

THE COMMISSION'S FIFTEEN MONTHS OF INDECISION SHOULD HAVE GIVEN RISE TO INDEPENDENT RIGHTS IN PETITIONER

It is elementary that First Amendment rights require and enjoy a preferred position in constitutional adjudication --

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**A special exception exists in the case of an attack upon a political candidate who, if he were permitted to respond would trigger a Section 315 right in his opponent or opponents. Times-Mirror Broadcasting Co., 40 F.C.C. 531 (1962). But even in this special circumstance the obligation at minimum runs to a spokesman designated by the candidate. 47 C.F.R. 73.123(c).

require it because of their fragility, enjoy it because of that fragility and their central importance in a democratic order. The delay which petitioner has here experienced illustrates that fragility: though the fairness doctrine be held to guarantee her viewpoint an airing, the passing of each month reduces the value of that airing to her. As the object of an attack made on February 17, 1969, her interest is in disabusing KTTV's hearers of the adverse impression Mr. Putnam stimulated. But the passage of time weakens memories of his specific charges; utlimately only an overall negative impression remains. After substantial delay, the exercise of her right of reply will risk the incurring of greater injury because she must resurrect the Putnam charges in her hearers' memories in order to refute them. The long unanswered charges have, during the period of silence, done injury to her that cannot be repaired. The delayed response is less valuable to her. And through it all KTTV's hearers have been the losers for want of an opportunity to receive and evaluate her response. None of these serious injustices and public disadvantages is consistent with the democratic values which the First Amendment exists to assure. See Freedman v. Maryland, 380 U.S. 51 (1965).

It is, of course, too late to repair these injuries in Mrs. Healey's case. But, if correction in principle is to take place, it must be enunciated at some point. Petitioner respectfully suggests that it would be appropriate for courts possessed of jurisdiction to review F.C.C. actions to entertain Fairness Doctrine petitions whenever they find the agency's delay to have become unreasonable. (In a case involving no more investigation than the present one, two months after receipt of a complaint would be reasonable; in others a longer time might be required.) Since it would contribute to the orderly administration of the agency's affairs for it to be warned before the court begins to act on such matters, petitioner further suggests that the court add to its holding in the present case an admonition that will serve as such a warning.

CONCLUSION

For the reasons set forth, petitioner respectfully urges that the court set aside the order of the Commission being reviewed and remand this matter to the Commission with directions to grant petitioner the relief sought in her complaint. Petitioner further urges that the court admonish the

Commission to permit no future delays, in excess of the time reasonably required and that delays incurred hereafter will be treated as denials for purposes of judicial review.

Respectfully submitted,

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APPENDIX

RULES AND REGULATIONS OF THE FEDERAL COMMUNICATIONS COMMISSION

§73.679 Personal attacks; political editorials. - (a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

(b) The provisions of paragraph (a) of this section shall not be applicable (i) to attacks on foreign groups or foreign public figures; (ii) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (iii) to bona fide newscasts, bona fide news interviews, and on on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of paragraph (a) shall be applicable to editorials of the licensee).